Supreme Court, U.S.
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In The

Supreme Court of the United States

KIMBERLY D. NONMACHER,

Petitioner,

v.

MARCELLA B. RITTER, M.D.,
AND BYRON B. HOLT, M.D.,

Respondents.

On Petition For A Writ Of Certiorari To The Fourteenth Court Of Appeals Of The State Of Texas At Houston, Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

This petition presents the following question:

Petitioner sued Respondents for medical malpractice.

The Medical Liability and Insurance Improvement Act of Texas required the plaintiff asserting a health care liability claim to file an expert report setting forth the applicable standards of care, the manner in which the care rendered by the physician or health care provider failed to meet the standards of care, and the causal relationship between that failure and the injury, harm or damages claimed.

Failure to comply with the statutory requirement of an expert report results in dismissal with prejudice.

However, the Act provides that the court shall grant a motion challenging the adequacy of an expert report "only if it appears to the court, after hearing, that the report does not represent a ***good faith effort*** to comply with the definition of an expert report" required by the statute. (Emphasis supplied.)

The Supreme Court of Texas has held that the only evidence which can be considered by the trial court, in finding whether the report is in good faith, is the report itself. Disregarding all other evidence of good faith offered by Petitioner, the trial court dismissed the action with prejudice as to both doctors. The Court of Appeals affirmed and the Supreme Court of Texas denied discretionary review.

QUESTION PRESENTED FOR REVIEW – Continued

By refusing to consider any evidence outside of the expert reports on the issue of good faith, did the trial court deprive Petitioner of procedural due process in violation of the Fourteenth Amendment to the United States Constitution?

LIST OF PARTIES

1. Petitioner: Kimberly D. Nonmacher
2. Respondent: Marcella B. Ritter, M.D.
3. Byron B. Holt, M.D.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays for a writ of certiorari to review the Order of the District Court of Harris County, Texas, 215th Judicial District, entered in its Cause No. 2000-63686 on February 12, 2002. Petitioner also prays for a writ of certiorari to review the mandate of the Fourteenth Court of Appeals issued January 5, 2004. (The record of proceedings in the trial court and on appeal is in the office of the Clerk of the Fourteenth Court of Appeals.)

OPINIONS BELOW

The Order of the District Court of Harris County, Texas, 215th Judicial District is reproduced in the appendix to this petition, App. 14. The Findings of Fact and Conclusions of Law of the District Court of Harris County, Texas, 215th Judicial District, is reproduced in the appendix to this petition, App. 16. The Supplemental Finding of Fact of the District Court of Harris County, Texas, 215th Judicial District, is reproduced in the appendix to this petition, App. 18. The Memorandum Opinion of the Fourteenth Court of Appeals is reproduced in the appendix to this petition, App. 1. The Judgment of the Fourteenth Court of Appeals of the State of Texas is reproduced in the appendix to this petition, App. 13. The orders of the Supreme Court of Texas denying Petitioner's petition for review entered October 10, 2003 and denying her motion for rehearing of her petition for review, entered December 5, 2003 are reproduced in the appendix to this petition, App. 74. The mandate of the Fourteenth Court of Appeals

issued January 5, 2004 is reproduced in the appendix to this Petition, App. 19.

STATEMENT OF JURISDICTION

The Supreme Court of Texas denied Petitioner's motion for rehearing of her petition for review on December 5, 2003, App. 74. This Petition was timely filed within 90 days of said order.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment XIV,

Section I

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner sued Respondents, medical doctors, for negligence. She alleged that she went to Dr. Ritter because

of a diagnosis by her primary care physician of a uterine fibroid tumor; that Dr. Ritter prescribed two shots of Lupron Depot to cause premature menopause and thereby shrink the tumor in preparation for surgery to remove it; that Dr. Ritter negligently prescribed an insufficient dosage; that she got worse instead of better as the tumor continued to grow; that she repeatedly tried to see the doctor, who negligently refused to see her and that she finally hemorrhaged and almost died on the operating table in the emergency room, where Respondent Holt performed emergency surgery to remove the tumor, also performing a hysterectomy. (Second Amended Original Petition, CR 225.)

As to Respondent Dr. Holt, who saved her life, she alleged that he was aware that she suffered from a rare vascular disorder, hemihypertrophy hemangioma, in the manifestation known as Klippel Trenaunay Syndrome, and that he, after her surgery, without researching this condition or consulting a hematologist, negligently prescribed hormone replacement therapy including Climara, Estradiol, synthroid and progesterone cream to be taken by Plaintiff and that this proximately caused Plaintiff to suffer serious blood-clotting including Portal vein thrombosis, clotting in the superior mesenteric vein, hypersplenism, pancytopenia and hyperbilirubinemia. (Plaintiff's Second Amended Original Petition, CR 225.)

The former Medical Liability and Insurance Improvement Act, Article 4590i, Vernon's Texas Civil Statutes (App. 23) in Section 13.01 (App. 42) thereof required her to file expert reports, defined in Section 13.01(r)(6) as follows:

> "Expert report" means a written report by an expert that provides a fair summary of the expert's opinions as of the date of the report regarding applicable standards of care, the manner in which the care rendered by the physician or health care provider failed to meet the standards, and the causal relationship between that failure and the injury, harm, or damages claimed.

(App. 48.) The Act was originally passed in 1977. Section 13.01 was added June, 1993, the same month that this Court decided *Daubert* v. *Merrell Dow Pharmaceuticals*, Inc., 509 U.S. 579 (1993) and Section 13.01 was amended in 1995 to include the provisions presently before the Court. Acts 1995, 74th Leg. ch. 140, §1 eff. Sept. 1, 1995. The Act was repealed by Act of May 16, 2003, 78th Leg., R.S., ch. 204, §10.02, 2003 Sess. Law Serv. 884 (Vernon) (current version at Tex. Civ. Pract. & Rem. Code Ann. §74.351 (Vernon Supp. 2004)). The definition of an expert report is the same in the current version as it was in former Article 4590i quoted above.

The new parol evidence rule for medical malpractice cases

Petitioner submitted two expert reports (App. 59, 60). Respondents filed motions to dismiss for insufficiency of the expert reports, citing the Supreme Court of Texas case of *American Transitional Care* v. *Palacios*, 46 S.W.3d 873, 878 (Tex. 2001). In that case the Supreme Court of Texas held that the expert report in question failed to state in nonconclusory terms what the hospital should have done in order to keep the patient from falling out of bed, and

dismissed the case with prejudice. In so holding the Court stated:

> "Filing a frivolous lawsuit can be litigation misconduct subject to sanction. See Tex. R. Civ. P. 13 (imposing sanctions for filing groundless motions, pleadings, or other papers in bad faith or for the purposes of harassment). And one purpose of the expert-report requirement is to deter frivolous claims. House Comm. on Civ. Prac., Bill Analysis, Tex. H.B. 971, 74th Leg., R. S. (1995). The Legislature has determined that failing to timely file an expert report, or filing a report that does not evidence a good-faith effort to comply with the definition of an expert report, means that the claim is either frivolous, or at best has been brought prematurely. See id. This is exactly the type of conduct for which sanctions are appropriate. See Transamerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 918 (Tex. 1991) (holding that "death-penalty" sanctions are appropriate when a party's discovery abuse justifies a presumption that its claims lack merit). For these reasons, we hold that an abuse-of-discretion standard of review applies to a trial court's decision to dismiss a case under section 13.01(e).
>
> "We next consider whether a trial court abused its discretion in dismissing the Palacioses' claims against American Transitional. The parties disagree about how to determine a report's adequacy under section 13.01(l). American Transitional argues that the trial court must engage in a two-step process: (1) the trial court must determine whether the report constitutes a fair summary of the expert's opinions, Tex. Rev. Civ. Stat. Ann. art. 4590i, 13.01(r)(6); and (2) if

the trial court concludes that the report is not a fair summary, it must then look outside the report at the plaintiff's conduct to determine whether the plaintiff made a good-faith effort to meet the statutory requirements, id. 13.01(1). The Palacioses, on the other hand, argue that the statute requires only one inquiry – whether the report evidences a good-faith effort to provide a fair summary of the expert's opinions. According to the Palacioses, the trial court does not have to make any factual determination because the only relevant information is in the report itself. We agree with the Palacioses that ***a trial court should look no further than the report in conducting a section 13.01(l) inquiry.***

"The issue for the trial court is whether 'the report' represents a good-faith effort to comply with the statutory definition of an expert report. Id. 13.01(l). That definition requires, as to each defendant, a fair summary of the expert's opinions about the applicable standard of care, the manner in which the care failed to meet that standard, and the causal relationship between that failure and the claimed injury. Id. 13.01(r)(6). ***Because the statute focuses on what the report discusses, the only information relevant to the inquiry is within the four corners of the document.***

"Under subsections 13.01(l) and (r)(6), the expert report must represent only a good-faith effort to provide a fair summary of the expert's opinions. A report need not marshal all the plaintiff's proof, but it must include the expert's opinion on each of the elements identified in the statute. See Hart v. Wright 16 S.W.3d 872, 877 (Tex.App.-Fort Worth 2000, pet. denied). In setting out the expert's opinions on each of those

elements, the report must provide enough information to fulfill two purposes if it is to constitute a good-faith effort. First, the report must inform the defendant of the specific conduct the plaintiff has called into question. Second, and equally important, the report must provide a basis for the trial court to conclude that the claims have merit. See 4 S.W.3d at 865 (Taft, J. dissenting); Wood v. Tice, 988 S.W.2d 829, 830 (Tex.App.-San Antonio 1999, pet. denied) (noting that one of the purposes of article 4590i is to deter frivolous claims).

"A report that merely states the expert's conclusions about the standard of care, breach, and causation does not fulfill these two purposes. Nor can a report meet these purposes and thus constitute a good-faith effort if it omits any of the statutory requirements. See, e.g., Hart, 16 S.W.3d at 877 (holding that a report was inadequate because it stated that the patient had a heart attack and the doctor breached the standard of care, without describing the standard of care); Wood, 988 S.W.2d at 831-32 (holding that an expert report did not meet the statutory requirements because it did not name the defendant's, state how the defendant's breached the standard of care, demonstrate causation and damages, or include a curriculum vitae). However, to avoid dismissal, a plaintiff need not present evidence in the report as if it were actually litigating the merits. The report can be informal in that the information in the report does not have to meet the same requirements as the evidence offered in a summary-judgment proceeding or at trial. See, e.g., Tex.R.Civ.P. 166(f) (setting out the requirements for the form and content of affidavits offered as summary-judgment proof);

> Tex.R.Evid. 802 (stating that most hearsay is inadmissible)." (Emphasis supplied).

Dr. Holt's motion to dismiss came on for hearing first. (RR Vol. 2.) At an adjourned hearing both motions were heard. (RR Vols. 3-6.) The trial court then dismissed the action against both doctors with prejudice. (App. 14.)

The "four corners" rule came up at the very beginning of the hearing on Dr. Holt's motion to dismiss, and came up repeatedly in the joint hearings of both motions which ensued. At the beginning of the hearing the Court stated:

> THE COURT: Now I read the Palacios case that came out just a few months ago as saying a number of things. One of the things it says squarely is I look no further than just the report of your expert in determining whether it's sufficient under 4590(i). Do you agree with that?
>
> MR. HARRIS: Seems to say that, Your Honor.
>
> THE COURT: Okay. And you said a second ago that you had a couple of other things that you also filed which I have seen in the record and I have read but it appears to me that I have the obligation for purposes of this hearing to ignore those other items you have in the record. You agree?
>
> MR. HARRIS: Well, I don't agree, but I'm not going to argue with the Court.

(RR Vol. 2, p. 6.) The "couple of other things" referred to by the Court were an extract from a textbook co-authored by an Assistant Professor of Surgery at the Harvard Medical School stating that a person suffering from hemihypertrophy hemangioma should not be prescribed estrogen (Pl. Ex. 1, App. 76; RR Vol. 6, admitted, RR Vol. 2, p. 15) and

an opinion from her treating hematologist diagnosing her as having Klippel Trenaunay Syndrome, a manifestation of hemihypertrophy hemangioma (Pl. Ex. 2, admitted, RR Vol. 2, p. 15). Also admitted for purposes of the appellate record was the deposition of Dr. Abramowitz (Pl. Ex. 20, admitted, RR Vol. 2, p. 15), Petitioner's treating hematologist, who testified that if he had been consulted by Dr. Holt he would not have recommended putting her on estrogen because patients with her condition have an increased risk of blood clotting, and his examination after the emergency operation indicated blood clotting which was new since his examination of the patient in 1998 (Pl. Ex. 20, pp. 10-11, 19-25).

Petitioner filed two motions for reconsideration (CR 203, 252). In Plaintiff's Supplemental Memorandum in Support of Plaintiff's Second Motion to Reconsider (CR 284 at 287) she alleged:

> "In *American Transitional Care, Inc.* v. *Palacios*, 46 S.W.3d 873 (Tex. 2001) the Supreme Court of Texas adopted an arbitrary "four corners" rule which would prevent the district court from considering any evidence outside of the four corners of an expert report in deciding whether Plaintiff and her counsel made a good faith effort to comply with the requirement of an expert report. This is really bizarre: the court cannot consider the extensive record made in the hearing on Defendant's motions to dismiss, including testimony of Plaintiff's counsel as to how hard he tried to comply and how his efforts with respect to Dr. Holt were frustrated by the doctor's counsel's having contacted the treating physician who then refused to furnish a report or even to speak to his own patient's attorney prior to his deposition. This effort should be considered.

> "*Palacios* should be limited to its facts. There the trial court granted a 30-day grace period. Here it has not done so. There was no evidence in that case concerning how hard the lawyer tried to get an expert report, to show his good faith. Here we submit the evidence outside of the report conclusively shows good faith and, with respect to Dr. Holt, efforts to overcome the obstructionism of his lawyers.
>
> "The four corners rule is unduly restrictive and bears no relation to accomplishing the purpose of the statute. No doubt the Supreme Court will see this one day in this case or another case. As applied to this case ***the four corners rule is unconstitutional because it violates the equal protection and due process clauses under both the state and federal constitutions.*** It is a wholly arbitrary restriction on evidence which would deprive Plaintiff of the jury trial to which she is entitled under the state and federal constitutions." (Emphasis supplied.) (CR 284.)

The motion was overruled. (CR 290.) Petitioner appealed to the Court of Appeals for the Fourteenth Supreme Judicial District of Texas, which affirmed. In her brief in that Court Petitioner alleged:

> "Under the 'four corners' rule as understood by the court below, Plaintiff is subject to the ultimate death penalty sanction, dismissal with prejudice – without being able to show any evidence outside of the four corners of her expert reports to establish that the reports were in fact a good faith effort to comply with the statutory requirement.
>
> "The Supreme Court has also mandated that this legal guillotine be reviewed under the 'abuse

of discretion' standard. The trial court is to look at the report, hold it up to the light, read it carefully and then decide, Thumbs Up, or Thumbs Down. Abuse of discretion is an extremely lenient standard of review.

"It will be noted that under the statute the trial court has no discretion in deciding what sanction to impose – the 'death penalty' sanction is mandated by statute. Now we are told that he is not required to consider any evidence outside the report itself. That is an extreme application, the injustice of which is demonstrated in the case at bar. Plaintiff suffered a one-two punch: first Dr. Ritter gave the wrong dosage and failed to follow up, so that she almost died, then Dr. Holt without studying her condition or consulting with a hematologist prescribed estrogen – ignoring other available treatments – which caused serious blood clots from which she will suffer the rest of her life, which may be a shortened span. The evidentiary cutoff could result in destruction of a meritorious cause of action. The abuse of discretion criterion facilitates the injustice which has occurred. These rules do not effectuate the purpose of the statute to prevent frivolous lawsuits, they enable defendants and their carriers to dismiss meritorious claims on technicalities and secure affirmance on appeal – which is what has happened in the case at bar in the district court. (The savings go to the carriers' bottom line.)"

"This arbitrary rule, combined with use of the abuse of discretion standard of review, deprives Plaintiff of due process under the 14th Amendment to the United States Constitution."

(Appellant's Brief, p. 22.) (Emphasis supplied.)

Petitioner then filed her petition for discretionary review by the Supreme Court of Texas, which was denied, and her motion for rehearing was overruled. (App. 74.) In her petition for review Petitioner stated:

> "The 'four corners' rule promulgated by the Supreme Court of Texas constitutes a brand-new parol evidence rule, for medical malpractice cases, which is unwarranted and which violates the express statutory prohibition of rule-making by the Supreme Court of Texas, Article 4590i, Sec. 13.01(q).[1] It deprives the trial court of any discretion to consider relevant evidence and violates Tex.R.Ev. 402. Here it kept the trial court from considering a treatise (Appendix, §12), the deposition of Dr. Ritter, the deposition of Dr. Holt and even the statutorily mandated CV of Dr. Holt.[2] ***By shutting down the evidence the trial court deprived Petitioner of procedural due process under the state constitution, Art. I, Sec. 13, and federal constitution, U. S. Constitution, 14th Amendment.***"

(Petition for Review, page 13.) (Emphasis supplied.)

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[1] Article 4590i(q) provides: "Notwithstanding the provisions of Section 22.004, Government Code, the supreme court may not amend or adopt rules in conflict with this section. The district courts and statutory county courts in a county may not adopt rules in conflict with this section."

[2] Error: this should have said Dr. Van Voorhis.

Summary of the evidence rendered irrelevant by the new parol evidence rule

Ironically, the opinion of the Court of Appeals is based upon facts set forth in Petitioner's brief in that court including facts which the trial court disregarded because of the new parol evidence rule from *Palacios*. After discussing the expert reports, below, we will fill in the additional facts supplied through other evidence which the trial court refused to consider.

The expert report on Dr. Ritter

The expert report which Petitioner submitted concerning care by Dr. Ritter, by Professor Bruce R. Carr, M.D., Director of the Division of Reproductive Endocrinology of the University of Texas Southwestern Medical Center at Dallas, states that Dr. Carr had examined "the records ***and deposition***" sent to him by Petitioner's counsel. (App. 60; emphasis supplied.) Only one deposition had been taken, that of Petitioner. Dr. Ritter's counsel attended, and cross-examined Petitioner there.

Dr. Carr in his report expressed the opinion that Dr. Ritter gave Petitioner too small a dose of Lupron, that it would have been customary to re-evaluate a patient every 2-3 months but that if she reported "***increasing pain*** she should be seen earlier and re-evaluated" because this might indicate necrosis of the fibroid requiring discontinuance of the drug or the surgery should be performed earlier, and that "In this case, ***this apparently was not done***." Further, he thought that the insufficient dosage "was probably not having much effect which would explain why she still had menstrual periods." As to the result, he said that the surgery "was performed as planned, but in

an ***emergency situation*** which placed the patient at ***increased risk***." He summed up by stating:

> "Thus in summary, the patient was not carefully followed, which would be considered ***customary***, but even more so with her history of K-T-S. Further, she received the wrong dose or wrong frequency of Depo Lupron." (Emphasis supplied.)

Facts in the deposition referred to in the expert report by Dr. Carr on Dr. Ritter

The following is a summary of the deposition to which Dr. Carr referred in his expert report. It was Petitioner's deposition (the only deposition which had been taken), taken by Petitioner's counsel.

Petitioner, Kimberly D. Nonmacher, was born with a rare vascular disorder, hemihypertrophy hemangioma (Pl. Ex. 22, p. 7). In 1998 she met with her doctor, Starr Borden, M.D., concerning a swelling on the right side of her abdomen (*Id.* 13). Dr. Borden determined that she had a fibroid uterine tumor, and recommended that she see an OB/GYN specialist. Petitioner then went to Defendant Marcella B. Ritter, M.D., (*Id.* 14). Dr. Ritter prescribed two shots of Lupron three months apart (*Id.* 17). After the first shot during the second week of October, 1998 (*Id.* 17) Petitioner experienced severe abdominal pain and other symptoms (*Id.* 18). Dr. Ritter had said that the Lupron would stop her menstruation and shrink the fibroid, but instead of stopping her menstrual periods they increased from six to eight days (*Id.* 19). She reported the longer menstrual periods to Dr. Ritter (*Id.* 20). On January 6, 1999, she was feeling nauseous, having terrible headaches and experiencing severe abdominal pain. She passed a

blood clot (*Id.* 21). She tried to reach Dr. Ritter, but was unable to do so and was advised by her associate to go to the emergency room at St. Luke's Hospital, where she was given vicodin for pain and received the second Lupron shot (*Id.* 23). She was seen there by Dr. Byron, who called Dr. Ritter's office, informed them that he had given the lupron shot, and recommended that she be seen by Dr. Ritter as soon as possible (*Id.* 25). On January 7th Miss Nonmacher called Dr. Ritter, but the doctor declined to see her, stating that there was nothing she could do at that time (*Id.* 26). After further abdominal pain Dr. Ritter a few days later called in a prescription of Darvocet-N 100 for the pain (*Id.* 26) and obtained an additional ultrasound on January 25th (*Id.* 28). Petitioner continued having abdominal pain and on March 21st she went to the emergency room at Memorial Hospital because of the abdominal pain, dizziness, nauseousness and some paralysis (*Id.* 29). She had trouble breathing and walking because the paralysis was in her legs (*Id.* 30). She called Dr. Ritter on March 22nd and requested that her surgery be moved up but Dr. Ritter said it could not take place before April 1st (*Id.* 31).

On March 23rd when she was getting ready to take a bath

> "I felt a very loud popping noise and I felt fire rush through my body and I felt the room start spinning. And instead of getting into the tub I got dressed and called my friend and told her what had happened. She advised me to call an ambulance and the EMS people arrived and they had to pick me up off the floor and get me to the ambulance and I had emergency surgery that day." (*Id.* 32)

Her recollection of the surgery includes the following:

> "I was in and out of consciousness, I was in shock. I recall hearing Dr. Holt on the other side of the room telling the nurse he didn't know if I was going to make it or not. I recall the nurses coming to me asking if there was anybody I had to call. I recall my blood pressure continually dropping. . . ." (*Id.* 177.)

She had a hysterectomy, removal of both ovaries and removal of the tumor, by Dr. Byron Holt (*Id.* 33).

Facts developed after the expert report on Dr. Ritter but before the hearing on her motion to dismiss

Defendant Ritter testified by deposition. She admitted that she only saw Kimberly D. Nonmacher one time, when she prescribed the Lupron Depot (Pl. Ex. 16, p. 17).[3] She said that she prescribed Lupron Depot in order to stop ovulation, cause temporary menopause, and thereby shrink the fibroid (*Id.* 18-19). However, she admitted that she gave the ***wrong dosage*** of Lupron Depot – that she gave only half as much as she should have given (*Id.* 20). The dosage which she prescribed, 3.75 milligrams would have been suitable for six monthly doses, but when she decided on two shots three months apart she said she should have doubled the dosage, to 7.50 mg. (*Id.* 21).

Respondent Holt, a surgeon, testified by deposition concerning the emergency surgery (Pl. Ex. 19). He said

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[3] She saw her for the second time at her deposition.

that the patient had an abdomen full of blood, that her blood pressure was 80 over 40, and that she was shocky, cold and clammy (*Id.* 8); that she was in excruciating pain, lying on her side holding her abdomen, and felt weak and dizzy. (*Id.* 9). She was in critical condition and he feared that she might die (*Id.* 12). He gave instructions to clear the operating room in twenty minutes, and that she was going directly into the operating room and not to the pre-op holding area (*Id.* 12). He used three pints of blood in performing a hysterectomy and removed the tumor (*Id.* 13).

Facts pertaining to Dr. Holt

The treating hematologist's letter, and a Treatise on the vascular disorder, both supplied prior to the expert report on Dr. Holt

Prior to submitting the expert report on Dr. Holt, Petitioner's attorney furnished his attorney the following documents: (i) on August 30, 2001, a letter opinion by her treating physician, Dr. Abramowitz, a hematologist, expressing the opinion that she suffered from Klippel Trenaunay Syndrome (Pl. Ex. 2); and (ii) on August 31, 2001 (Pl. Ex. 5) an extract from a 1988 textbook co-authored by an associate professor of surgery at the Harvard Medical School, ***VASCULAR BIRTHMARKS Hemangiomas and Malformations***, by John B. Mulliken and Anthony E. Young, which stated, inter alia:

> " . . . [W]e strongly suggest that no patient with extensive venous or combined malformations receive estrogen for contraceptive or other purposes." (Pl. Ex. 1., App. 76.; admitted RR Vol. 2, p. 15.)

The expert report on Dr. Holt

The expert report on Dr. Holt, by Professor Brad Van Voorhis, M.D., of the University of Iowa Department of OB/GYN, explained that a patient with this disorder faced an increased risk of blood-clotting if given estrogen without an anticoagulant, and said that consultation with a hematologist would have been prudent. (Pl. Ex. 13, App. 59.)

Dr. Van Voorhis' impressive CV is also in evidence (Pl. Ex. 14, admitted RR Vol. 2, p. 15); however, the trial court volunteered this statement at the hearing:

> THE COURT: Okay. I am not going to ask Mr. Sunosky to respond at all to the argument regarding the CV because I think that, ***looking to the CV, I go beyond what I am authorized to do. I am authorized or rather instructed to look at the four corners of the report***. That's what I have done. Notwithstanding the fact that I have admitted over objection tremendous amounts of other matters so that your record will be complete.

(Emphasis supplied.) (RR 5 page 5.) The CV is mandated by the statute, Section 13.01(d)(1), App. 44.

At the hearing on Dr. Holt's motion to dismiss, the Court admitted a revised report on Dr. Holt (Pl. Ex. 17; App. 75; admitted RR Vol. 3, p. 24). The revised report includes the statement: "Therefore, the use of estrogen ***probably*** contributed to the development of blood clots in Kimberly Nonmacher." (Emphasis supplied.) It also specified other ways to prevent osteoporosis, not in his original report.

Facts developed after the expert report on Dr. Holt but before the hearing on his motion to dismiss

Dr. Joel W. Abramowitz, a hematologist and treating physician for Kimberly D. Nonmacher, testified by deposition (Pl. Ex. 18, admitted RR Vol. 3, p. 33). His deposition was taken on December 14, 2001, which was after the expert report was submitted relating to Dr. Holt's treatment of this patient. He diagnosed her hemihypertrophy hemangioma as Klippel Trenaunay Syndrome. (*Id.* 6). Dr. Abramowitz was of the opinion that Miss Nonmacher had developed portal vein thrombosis with cavernous transformations, possible clot in the superior mesenteric vein and that she now had varices that you could see on the ultra sound and cat scan that would be something new since 1998. He said that patients with her underlying condition have an increased risk of blood clotting (*Id.* 22) and that if he had been consulted he would probably have recommended that this patient not be on estrogen (*Id.* 25), that it is his opinion that her condition may have been aggravated by hormone replacement therapy (*Id.* 19).

Related proceeding concerning Dr. Ritter's treatment of Kimberly D. Nonmacher

The facts of the case against Dr. Ritter are also the subject of a proceeding before the Texas State Board of Medical Examiners. The Staff of the Texas State Board of Medical Examiners, after conducting an investigation and hearing evidence, has filed a complaint with the Board of Medical Examiners alleging that Dr. Ritter in her treatment of Petitioner violated the Medical Practice Act, TEX. OCC. CODE. ANN., Title 3, Subtitle B, Chapters 151-165

(Vernon's 2002). (App. 62.) The Staff asks the Board of Medical Examiners "to enter an order to revoke or suspend [Dr. Ritter's] medical license or that other means of discipline be imposed." (App. 69.) (These records are accessible at www.tsbme.state.tx.us under physician profiles.)

REASONS FOR GRANTING THE WRIT

The purpose of the Medical Liability and Insurance Improvement Act is to get rid of frivolous medical malpractice actions. Section 13.01 is a salutary provision designed to sift the wheat from the chaff at an early stage of a lawsuit. The procedure for prompt furnishing of expert reports is complemented by a prohibition on use of any such report in a deposition, at trial or other proceeding. (Section 13.01(k), App. 45.) The Act carries into effect this Court's policy requiring reliability of expert testimony in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

The new "four corners" rule from *Palacios*, a dictum in that case, repeated in *Bowie Medical Hospital* v. *Wright*, 79 S.W.3d 48 (Tex. 2002) and elevated into a square holding in *Horizon/CMS Health Care Corporation* v. *Auld*, 34 S.W.3d 887 (Tex. 2000) has already resulted in the dismissal of numerous medical malpractice actions. *Hawkins* v. *Gomez*, No. 01-02-01195 (Tex. Civ. App. – Houston [1st Dist.] 2004); *Jones* v. *Ark-La-Tex V.N.*, No. 06-03-00056-CV (Tex. Civ. App. – Texarkana 2004); *Leston* v. *Cwikla*, No. 05-02-01712-CV (Tex. Civ. App. – Dallas, 2003); *Barko* v. *Genzel*, No. 11-02-00237-CV (Tex. Civ. App. – Eastland, 2003); *Rice* v. *HNMC*, No. 14-01-00504-CV (Tex. Civ. App. – Houston [14th Dist.] 2003); *Strom* v.

Memorial Hermann Hospital System, 110 S.W.3d 216 (2003) (Tex. Civ. App. – Houston [1st Dist.] 2003); *Alphin* v. *Huguley Nursing Center*, 109 S.W.3d 574 (Tex. Civ. App. – Fort Worth, 2003); *Villa* v. *Hargrove*, 110 S.W.3d 74 (Tex. Civ. App. – San Antonio 2003); *Eichelberger* v. *St. Paul Medical Center*, 99 S.W.3d 636 (Tex. Civ. App. – Dallas, 2003); *Doades* v. *Syed*, 94 S.W.3d 664 (Tex. Civ. App. – San Antonio, 2002); *Shaw* v. *BMW Healthcare*, 100 S.W.3d 8 (Tex. Civ. App. – Tyler, 2002; pet. den.); *Forrest* v. *Danielson*, 77 S.W.3d 842 (Tex. Civ. App. – Tyler, 2002); *De Leon* v. *Vela*, 70 S.W.3d 194 (Tex. Civ. App. – San Antonio, 2001). It seems like more dismissals are affirmed almost every day.

The issue before the trial court at the hearing on a motion to dismiss under Section 13.01 is not whether the expert report complied with the statute: the issue is whether plaintiff's effort to do so was "in good faith." The issue is plaintiff's state of mind. To suggest an analogy, suppose an action for fraudulent inducement of a contract. Could the court instruct the jury that the only evidence it could consider is within the four corners of the document? The forfeiture of a cause of action under this statute is a sanction. Assume the cause of action is well based, outside of the four corners of the expert report. Thus a punishment is being imposed that is quite substantial. It is like a fine. It is quasi-criminal. Suppose in a case of criminal conspiracy the court were to instruct the jury that not only is the defendant not required to take the witness stand, but he will not be permitted to do so, and they should reach their finding based upon their examination of a bunch of documents. *Cf. Franks* v. *Delaware*, 438 U.S. 154 (1978) holding that the Fourth Amendment required a court to hear evidence of deliberate falsehood in a search

warrant affidavit, rejecting a four-corners rule with respect to the affidavit.

This statute and comparable statutes in other states have a laudable purpose, but the creation of a new parol evidence rule does not carry that purpose into effect and may result in the dismissal with prejudice of many meritorious claims as it did with this one. Dismissal with prejudice is the functional equivalent of a summary judgment. Petitioner submits that the evidence should be construed favorably to the nonmovant. *Poller* v. *Columbia Broadcasting*, 368 U.S. 464, 473 (1962). On the whole of the record before the trial court it is clear that Petitioner's claims are not frivolous. She almost died on the operating table. She has blood-clotting from which she will suffer the rest of her life. These injuries could easily have been avoided.

The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Mathews* v. *Eldridge*, 424 U.S. 319, 333, 335 (1976). Due process "is flexible and calls for such procedural protections as the particular situation demands." *Morrisey* v. *Brewer*, 408 U.S. 471, 481 (1972). This case involves a substantial private interest and the risk of an erroneous ruling on the good faith issue by application of the "four corners" doctrine is great. Good faith is a state of mind which may not be adequately shown by the expert report itself. There was no practical reason for the court to disregard the evidence outside of the official reports, summarized above. Its consideration would entail no delay. There is no justification for the "four corners" rule.

A related question which needs elaboration is whether an expert is ***required*** by the statute to express an opinion on an ultimate question to be decided by the trier of fact.

Real experts are conservative. The defendant has made the record. The expert must consider what would have happened if the facts were different. If the defendant's action ***may*** have caused the bad result, the jury may find an expert's opinion to that effect helpful. That should be a sufficient showing of causation. Here, for example, Dr. Van Voorhis referred to other methods of avoiding blood-clotting if estrogen (Estradiol) were not used. The record shows that if Dr. Holt had called Dr. Abramowitz he would have been told not to prescribe estrogen. A jury may find these opinions persuasive on the issue of negligence. The statute should not be construed to require an expert to say that a defendant was negligent. The real question is whether the expert's conservative opinion shows that the action was brought in good faith, i. e., is not frivolous. No higher requirement should be imposed.

What the trial courts are doing is nit-picking expert reports to find any possible deficiencies in compliance with the statute and using any such deficiencies, or even ambiguities, as a justification for finding that the report is not in good faith, and the appellate courts are affirming upon the basis that the trial court can use any possible deficiency as support for its finding as to the plaintiff's state of mind, which will be reviewed for abuse of discretion. If this Honorable Court will read the expert reports (App. 59, 60, 75) it will be apparent that this action is not frivolous. The remainder of the evidence which was disregarded by the trial court supports this conclusion.

In this rapidly evolving field of the law the opinion of the Supreme Court of Texas will be cited in other states as a rule for the exclusion of relevant evidence as to good faith. It is of national importance. The judgment in this case should be reversed and the "four corners" rule of

Palacios should be explicitly rejected by this Court. It should have been, in any case, an "eight corners" rule: here the trial court refused even to consider the CV of Brad Van Voorhis even though that CV was mandated by the statute!

As matters now stand the outcome of this case on the merits was determined as to each doctor by the contents of an expert report, a hearsay document. This violates the fundamental principle of fairness on which this Court's interpretation of the Fourteenth Amendment should depend: the right to introduce relevant evidence on any disputed issue of fact – especially where that issue is a state of mind.

CONCLUSION

The mandate of the Court of Appeals should be withdrawn and the judgment of the trial court dismissing this action with prejudice should be reversed and this cause should be remanded for trial or for further proceedings in accordance with this Court's opinion.

Respectfully submitted,

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Affirmed and Memorandum Opinion filed April 3, 2003.

(SEAL)

In The

Fourteenth Court of Appeals

NO. 14-02-00162-CV

KIMBERLY D. NONMACHER, Appellant

V.

MARCELLA B. RITTER, M.D., and
BYRON B. HOLT, M.D., Appellees

On Appeal from the 215th District Court
Harris County, Texas
Trial Court Cause No. 00-63686

MEMORANDUM OPINION

Appellant Kimberly Nonmacher appeals a judgment dismissing her medical-malpractice lawsuit as a sanction for her failure to file adequate expert reports as to the two defendant-doctors. *See* TEX. REV. CIV. STAT. ANN. art. 4590i, § 13.01 (Vernon Supp. 2003). On appeal, Nonmacher claims both expert reports represented a good-faith effort to comply with the statute and, in the alternative, the trial court should have granted her a thirty-day grace period. Nonmacher also complains that the Texas Supreme Court's directive to examine only the "four corners" of a tendered report to determine whether it represents a good-faith effort at compliance (1) is a violation of the statutory prohibition against adopting rules in

conflict with article 4590i, section 13.01, and (2) deprived Nonmacher of procedural due process. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant Kimberly Nonmacher apparently was born with a rare vascular disorder known as hemihypertrophy hemangioma. In 1998, she was diagnosed with a fibroid uterine tumor. She went to see Dr. Marcella Ritter, an OB/GYN specialist, who prescribed two injections of Lupron Depot hormone, at three-month intervals, for the purpose of shrinking the tumor, followed by surgery to remove the tumor. Nonmacher's surgery was scheduled for April 1999. Nonmacher received the first injection in October 1998. In January 1999, Nonmacher was admitted to the emergency room with severe abdominal pain, at which time she received the second injection. On March 21, 1999, Nonmacher was admitted to the emergency room with complaints of abdominal pain, nausea, and paralysis. Nonmacher alleges that she tried to see Dr. Ritter the next day, but Dr. Ritter refused to see her.

On March 23, Nonmacher began bleeding internally and was again taken to the emergency room. There, Dr. Byron Holt performed an emergency hysterectomy, during which he removed the tumor as well as Nonmacher's ovaries. Following the surgery, Dr. Holt prescribed hormone replacement therapy, including estrogen. Nonmacher alleges that since her surgery, she suffers from serious blood clotting that has impaired her quality of life.

Nonmacher filed suit against both Dr. Ritter and Dr. Holt, alleging medical negligence. Nonmacher claims Dr. Ritter was negligent in (1) prescribing the wrong dosage of Lupron Depot, (2) failing to evaluate Nonmacher's condition

at regular intervals, and (3) failing to re-evaluate Nonmacher when Dr. Ritter was informed of her complications. Nonmacher further alleges Dr. Holt was aware of her rare vascular condition and negligently failed to either research the condition or consult a hematologist before prescribing estrogen. In an effort to comply with article 4590i, section 13.01, Nonmacher filed two separate reports, from two different doctors, addressing the conduct of Dr. Ritter and Dr. Holt. *See* TEX. REV. CIV. STAT. ANN. art. 4590i, § 13.01(d). Both defendants filed motions to dismiss Nonmacher's claims for noncompliance with the statute. *See id.* § 13.01(e). Nonmacher responded to the motions by contending that the submitted reports were sufficient under the statute. In addition, Nonmacher timely filed separate motions requesting a thirty-day grace period to comply with section 13.01. *See id.* § 13.01(g). The trial court granted both defendants' motions to dismiss and denied Nonmacher's motions for a grace period.

SUFFICIENCY OF EXPERT REPORTS

Section 13.01 of article 4590i sets forth certain procedural requirements applicable to health care liability claims. Under subsection (d), a claimant who wishes to pursue her claim is required to furnish an expert report for each defendant. *Id.* § 13.01(d). The statute defines an "expert report" as

> a written report by an expert that provides a fair summary of the expert's opinions as of the date of the report regarding applicable standards of care, the manner in which the care rendered by the [defendant] failed to meet the standards, and the causal relationship between that failure and the injury, harm, or damages claimed.

Id. § 13.01(r)(6). Thus, the report must set out, in non-conclusory language, the expert's opinions about three elements of the claim: the standard of care, breach, and causation. *See Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios,* 46 S.W.3d 873, 879 (Tex. 2001). Subsection (e) provides that if the plaintiff fails to comply with subsection (d) within the time allowed, the court shall, on the defendant's motion, enter an order dismissing the claim with prejudice as a sanction against the claimant. *See* TEX. REV. CIV. STAT. ANN. art. 4590i, § 13.01(e); *Palacios,* 46 S.W.3d at 877. Finally, subsection (*l*) requires the trial court to grant a motion challenging the adequacy of an expert report "if it appears to the court, after hearing, that the report does not represent a good faith effort to comply with the definition of an expert report in Subsection (r)(6) of this section." TEX. REV. CIV. STAT. ANN. art. 4590i, § 13.01(*l*). The report itself must include the required information within its four corners. *Bowie Mem'l Hosp. v. Wright,* 79 S.W.3d 48, 53 (Tex. 2002); *Palacios,* 46 S.W.3d at 878.

Report on Dr. Ritter

In her first issue, Nonmacher claims the trial court erred in dismissing her claim against Dr. Ritter because the report she submitted in connection with this claim complied with article 4590i, section 13.01. We review the trial court's dismissal of a claim under section 13.01(e) for an abuse of discretion. *Palacios,* 46 S.W.3d at 878. As to Dr. Ritter's treatment, Nonmacher presented the report of Dr. Bruce Carr. The trial court found that Dr. Carr's report "does not represent a good faith effort to comply with the definition of an expert report in Section 13.01(r)(6)." Dr. Carr's report states that a woman being treated with

Lupron Depot "should be appropriately evaluated at regular intervals," and if the patient reports increasing pain, she "should be seen earlier and re-evaluated." This report also states that, for injections given at three-month intervals, a larger dose of Lupron Depot should have been prescribed. Dr. Carr's report then states the following:

> Thus the drug was probably not having much effect and would explain why she still had menstrual periods. However, the outcome, i.e. surgical removal of the fibroid was performed as planned, but in an emergency situation which placed the patient at increased risk.

According to Nonmacher, the harm as described by Dr. Carr is the "increased risk" she faced as a result of having her surgery in an emergency situation as opposed to when it was scheduled. Dr. Carr's report can fairly be read to suggest that the emergency nature of her surgery resulted in increased risk. However, Dr. Carr's report does not provide a fair summary of his opinion regarding the causal connection, if any, between Dr. Ritter's alleged negligence and Nonmacher's need for emergency surgery or the resulting increased risk to her.

Nonmacher claims that Dr. Carr's reference to "surgical removal of the fibroid . . . in an emergency situation" as "the outcome" demonstrates that Dr. Ritter's negligence caused her injury. We disagree. Nothing in Dr. Carr's report links this "outcome" to any alleged negligence by Dr. Ritter. The trial court reasonably could have determined that Dr. Carr's report failed to represent a good-faith effort to summarize the causal relationship. *See Wright,* 79 S.W.3d at 53. Accordingly, the trial court did not abuse its discretion in granting Dr. Ritter's motion to dismiss. We overrule Nonmacher's first issue.

Report on Dr. Holt

Nonmacher similarly claims, in her third issue, that the report concerning Dr. Holt, prepared by Dr. Brad Van Voorhis, complied with section 13.01.[1] In this report, Dr. Van Voorhis states that, in his opinion, consultation with a hematologist or vascular disease expert before giving Nonmacher estrogen "would have been prudent." Dr. Van Voorhis also states that other options exist for protection against bone loss that would not place the patient at increased risk of blood clots, as estrogen would. We conclude that this language does not constitute an opinion regarding the applicable standard of care, nor does it constitute an opinion as to whether Dr. Holt's treatment failed to meet that standard. At best, Dr. Van Voorhis's report merely states that he would have treated Nonmacher differently and that another course of treatment was less risky. Thus, Dr. Van Voorhis's report does not satisfy the requirements of section 13.01. *See Palacios,* 46 S.W.3d at 880. The trial court did not abuse its discretion in granting Dr. Holt's motion to dismiss. Nonmacher's third issue is overruled.

---

[1] The relevant portion of Dr. Van Voorhis's report states as follows:

> [T]he use of estrogen may have contributed to the development of blood clots in Kimberly Nonmacher. . . . There are other options for protection against bone loss that would not place a patient at increased risk for the development of blood clots as estrogen does. In my opinion, consultation with a hematologist or vascular disease expert would have been prudent before giving this patient estrogen. On the other hand, patients with KTS are at risk for developing blood clots even in the absence of estrogen therapy so it is hard to say the exact cause of the blood clot that developed.

MOTIONS FOR THIRTY-DAY GRACE PERIOD

In her second and fourth issues, Nonmacher asserts the trial court erred in denying her a thirty-day grace period to bring her expert reports in compliance with the statutory requirements. Nonmacher filed motions as to both defendants under section 13.01(g), which provides as follows:

> Notwithstanding any other provision of this section, if a claimant has failed to comply with a deadline established by Subsection (d) of this section and after hearing the court finds that the failure of the claimant or the claimant's attorney was not intentional or the result of conscious indifference but was the result of an accident or mistake, the court shall grant a grace period of 30 days to permit the claimant to comply with that subsection.

TEX. REV. CIV. STAT. ANN. art. 4590i, § 13.01(g). Nonmacher claims she was entitled to a grace period because her failure to comply with section 13.01(d) resulted from an accident or mistake. We review the trial court's denial of her motions under an abuse-of-discretion standard. *See Nguyen v. Kim,* 3 S.W.3d 146, 151 (Tex. App. – Houston [14th Dist.] 1999, no pet.).

As to Nonmacher's claims against both defendants, the trial court found that her "failure to file the required expert report[s] . . . was not the result of an accident or mistake." With respect to Dr. Ritter, the only "mistake" Nonmacher identifies in her brief is that her attorney was "too generous in allowing multiple postponements of depositions" that prevented Dr. Carr from being able to review those depositions before submitting his report. Nonmacher makes the same argument regarding Dr. Van

Voorhis's report on Dr. Holt. However, Nonmacher provided the trial court with no evidence to suggest that these depositions were necessary for Dr. Carr or Dr. Van Voorhis to provide a fair summary of their opinions regarding the applicable standards of care, breach, and causation. Thus, even if we assume that the actions of Nonmacher's attorney were an "accident or mistake" as contemplated by section 13.01(g), the trial court did not err in finding that Nonmacher's failure to comply with section 13.01(d) did not result from those actions.

As to her claim against Dr. Holt, Nonmacher also claims that her attorney's mistake in postponing the deposition of Nonmacher's treating physician, Dr. Joel Abramowitz, prevented her from using the transcript of Dr. Abramowitz's deposition as an expert report. However, in his deposition, Dr. Abramowitz expressly refused to give his opinion regarding the applicable standard of care for a doctor in Dr. Holt's position. This deposition transcript would not have satisfied the statutory definition of an "expert report." *See Palacios,* 46 S.W.3d at 880. Therefore, any delay in deposing Dr. Abramowitz was not a cause of Nonmacher's noncompliance with section 13.01(d).

Finally, Nonmacher contends her attorney mistakenly signed a medical authorization form that permitted Dr. Holt's attorneys to talk to Nonmacher's treating physician about her treatment without Nonmacher's attorney being present. In a supplemental finding of fact, the trial court found that Nonmacher's attorney was not aware of this provision and would not have signed it otherwise. However, Nonmacher presented no evidence why this "mistake" prevented her from complying with section 13.01(d). Nonmacher's argument relies on wholly unsupported speculation that (1) Dr. Holt's attorneys improperly used

this authorization to convince Nonmacher's treating physician not to provide a report against Dr. Holt and (2) any such report would have satisfied section 13.01(r)(6). Because Nonmacher presented no evidence to support these claims, the trial court reasonably could have determined that Nonmacher's noncompliance with section 13.01(d) was not a result of this mistake by Nonmacher's attorney.

The trial court did not abuse its discretion in denying either of Nonmacher's motions for a thirty-day grace period.[2] We overrule Nonmacher's second and fourth issues.

RELIANCE ON *PALACIOS*

In her final three issues, Nonmacher claims the trial court erroneously relied on the Texas Supreme Court's opinion in *Palacios* in dismissing her claims. Specifically, Nonmacher attacks the *Palacios* court's pronouncement that the only relevant information in deciding a challenge to the adequacy of an expert report is "within the four corners" of the report. *Palacios,* 46 S.W.3d at 878. Nonmacher argues (1) the *Palacios* court adopted a "rule" in violation of section 13.01(q), and (2) this "rule" violates Nonmacher's rights under the Fourteenth Amendment to the United States Constitution and the "open courts"

[2] Dr. Ritter also argues that section 13.01 does not provide for a thirty-day extension when, as here, the claimant timely files a report, but the court finds it does not represent a good-faith effort to comply with section 13.01(r)(6). Because we conclude that Nonmacher would not have been entitled to an extension under section 13.01(g), we need not address this issue.

provision of the Texas Constitution. *See* U.S. CONST. amend. XIV; TEX. CONST. art. I, § 13.

Section 13.01(q)

In her fifth issue, Nonmacher claims the trial court erred in following *Palacios* because the supreme court's opinion violated section 13.01(q), which provides that "[n]otwithstanding the provisions of Section 22.004, Government Code, the supreme court may not amend or adopt rules in conflict with [section 13.01]." TEX. REV. CIV. STAT. ANN. art. 4590i, § 13.01(q). Section 22.004 of the Government Code authorizes the supreme court to promulgate rules of practice and procedure in civil actions and establishes specific procedures for the adoption and amendment of those rules. *See* TEX. GOV'T CODE ANN. § 22.004 (Vernon Supp. 2002). The supreme court's opinion in *Palacios* did not adopt or amend any "rules" as contemplated by section 13.01(q). *See State Dep't of Highways & Pub. Transp. v. Payne,* 838 S.W.2d 235, 241 (Tex. 1992) ("[W]e do not revise our rules by opinion.").

Furthermore, Nonmacher has not shown any conflict between the *Palacios* "rule" and section 13.01. Nonmacher claims that because section 13.01(l) requires a "hearing," the Legislature intended to permit claimants to present relevant evidence outside of the report. However, the statute's reference to a "hearing" does not necessarily contemplate the presentation of evidence. *See* BLACK'S LAW DICTIONARY 725 (7th ed. 1999) (distinguishing an "evidentiary hearing" from "a hearing at which only legal argument is presented"). Indeed, unless the express language or context of the statute requires it, the term "hearing" does not even require a personal appearance or oral

presentation to the court. *See Gulf Coast Inv. Corp. v. NASA 1 Bus. Ctr.*, 754 S.W.2d 152, 153 (Tex. 1988) (per curiam). Accordingly, the *Palacios* court did not violate section 13.01(q). We overrule Nonmacher's fifth issue.

Constitutional Challenges

In her sixth and seventh issues, Nonmacher claims the trial court's exclusive reliance on the "four corners" of the submitted report deprived her of procedural due process. Nonmacher argues that because the trial court refused to consider evidence outside the report on the question of whether the report represented a good-faith effort to comply with the statute, she was deprived of her right to a hearing. As noted above, however, Nonmacher has not demonstrated any entitlement to an *evidentiary* hearing. There is no dispute that Nonmacher was given an opportunity to be heard before the trial court dismissed her claims. We overrule Nonmacher's sixth and seventh issues.

Dr. Ritter's Cross Point

In her brief, Dr. Ritter raises a single cross point, asserting that the trial court erred in failing to award her attorney's fees and court costs. Because Dr. Ritter did not file a notice of appeal, we will not consider this argument. *See* Tex. R. App. P. 25.1(c).

Conclusion

Properly relying on our supreme court's opinion in *Palacios,* the trial court did not abuse its discretion in dismissing all of Nonmacher's claims for noncompliance

with article 4590i, section 13.01. Nor did the trial court abuse its discretion in denying Nonmacher's requests for an additional thirty days to comply. We affirm the trial court's judgment.

/s/ Leslie Brock Yates
Justice

Judgment rendered and Memorandum Opinion filed April 3, 2003.

Panel consists of Justices Yates, Anderson, and Frost.

April 3, 2003

(SEAL)

JUDGMENT

The Fourteenth Court of Appeals

KIMBERLY D. NONMACHER, Appellant

NO. 14-02-00162-CV V.

MARCELLA B. RITTER, M.D., and
BYRON B. HOLT, M.D., Appellees

This cause, an appeal from the judgment in favor of appellees, Marcella B. Ritter, M.D., and Byron B. Holt, M.D., signed February 12, 2002, was heard on the transcript of the record. We have inspected the record and find no error in the judgment. We order the judgment of the court below **AFFIRMED**.

We order appellant, Kimberly D. Nonmacher, to pay all costs incurred in this appeal. We further order this decision certified below for observance.

NO. 2000-63686

KIMBERLY D. NONMACHER	§	IN THE DISTRICT
	§	COURT OF
VS.	§	HARRIS COUNTY,
	§	TEXAS
MARCELLA B. RITTER, M.D. and BYRON B. HOLT, M.D.	§	215th JUDICIAL
	§	DISTRICT

ORDER

On January 31, 2002 the court entered an order denying defendant Ritter's Motion to Dismiss Pursuant to Article 4590i. Additionally, on February 1, 2002 the court entered an order granting defendant Holt's Motion to Dismiss Pursuant to Article 4590i. Those orders are hereby vacated and set aside.

Before the court considered the defendants' respective motions to dismiss, the court considered plaintiff's motion for a thirty day grace period as to both defendants. The plaintiff's motion for a thirty day grace period, (the 4590i(g) motion), is hereby denied as it relates to both defendants.

After the court considered the plaintiff's motion for a thirty day grace period, the court considered the defendants' motions to dismiss pursuant to 4590i. After considering the motions, the responses, the arguments of counsel, the court hereby grants the dismissal motions of Holt and Ritter. Therefore, plaintiff Kimberly Nonmacher's claims against BYRON B. HOLT, M.D. and against MARCELLA B. RITTER, M.D. are herby [sic] dismissed with prejudice for failure to comply with section

13.01 of the Medical Liability and Insurance Improvement Act.

It is so ordered.

SIGNED the 12th day of February 2002.

/s/ Levi J. Benton
JUDGE PRESIDING

Cause No. 2000-63686

KIMBERLY D. NONMACHER, Plaintiff	IN THE DISTRICT COURT OF
Vs.	HARRIS COUNTY, TEXAS
MARCELLA B. RITTER, M.D., and BYRON B. HOLT, M.D., Defendants	215TH JUDICIAL DISTRICT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed Feb. 21, 2002)

The Court finds the following facts:

1. The report of Bruce R. Carr, M. D., dated November 12, 2001 does not represent a good faith effort to comply with the definition of an expert report in Section 13.01(r)(6), V.A.T.C.S.

2. Plaintiff's failure to file the required expert report with respect to her claim against Defendant Marcella B. Ritter was not the result of an accident or mistake.

3. The report of Brad Van Voorhis, M. D., does not represent a good faith effort to comply with the definition of an expert report in Section 13.01(r)(6), V.A.T.C.S.

4. Plaintiff's failure to file the required expert report with respect to her claim against Defendant Byron B. Holt was not the result of an accident or mistake.

The Court concludes as a matter of law that Plaintiff was Fproperly [sic] sanctioned by the Court's order entered February 12, 2002 dismissing this action with prejudice to its refiling.

Signed this 28 day of Mar., 2002.

/s/ Levi J. Benton
Levi J. Benton
JUDGE PRESIDING

No. 2000-63686

KIMBERLY D. NONMACHER	§	IN THE DISTRICT
VS.	§	COURT OF
	§	HARRIS COUNTY,
MARCELLA B. RITTER, M.D. et al	§	TEXAS
	§	215TH JUDICIAL
	§	DISTRICT

SUPPLEMENTAL FINDING OF FACT

(Filed Mar. 28, 2002)

The Court finds that Nonmacher's attorney was not aware when he signed the medical authorization submitted by defendant Holt's attorney that it contained an authorization for Holt's attorney to discuss her treatment with her physicians without Nonmacher's attorney being present and would not have signed it if he had been aware of that provision. The court concludes in law that this is not the type of mistake that precludes compliance with the statute at issue.

SIGNED: March 28, 2002.

/s/ Levi J. Benton
JUDGE PRESIDING
215TH DISTRICT
COURT

(SEAL)

MANDATE

The Fourteenth Court of Appeals

NO. 14-02-00162-CV

KIMBERLY D. NONMACHER, Appellant

V.

MARCELLA B. RITTER, M.D., and BYRON B. HOLT, M.D., Appellees

Appeal from the 215th District Court of Harris County. (TR. Ct. No. 00-63686). Opinion delivered by Justice Yates. Justices Anderson and Frost also participating.

TO THE 215TH DISTRICT COURT OF HARRIS COUNTY, GREETINGS:

Before our Court of Appeals, on the 3rd day of April A.D. 2003, the cause upon appeal to revise or reverse your judgment was determined. Our Court of Appeals made its order in these words:

> This cause, an appeal from the judgment in favor of appellees, Marcella B. Ritter, M.D., and Byron B. Holt, M.D., signed February 12, 2002, was heard on the transcript of the record. We have inspected the record and find no error in the judgment. We order the judgment of the court below **AFFIRMED.**
>
> We order appellant, Kimberly D. Nonmacher, to pay all costs incurred in this appeal. We further order this decision certified below for observance.

WHEREFORE, WE COMMAND YOU to observe the order of our said Court in this behalf and in all things have it duly recognized, obeyed, and executed.

WITNESS, the Hon. Adele Hedges, Chief Justice of our Fourteenth Court of Appeals, with the Seal thereof affixed, at the City of Houston, January 5, 2004.

ED WELLS, Clerk

[SEAL] By /s/ Ed Wells

(SEAL)

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711

(512) 463-1312

December 5, 2003

Mr. Brantly Harris
808 Travis Street, Suite 1424
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Mr. William J. Sharp
William J. Sharp & Associates
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Suite 1650
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RE: Case Number: 03-0698
Court of Appeals Number: 14-02-00162-CV
Trial Court Number: 2000-63686

Style: KIMBERLY D. NONMACHER

v.

MARCELLA B. RITTER, M.D., AND BYRON B. HOLT, M.D.

Dear Counsel:

Today, the Supreme Court of Texas denied the motion for rehearing of the above styled petition for review.

Sincerely,

/s/ Andrew Weber
Andrew Weber, Clerk

by Nancy J. Vega,
Chief Deputy Clerk

cc: Mr. Charles Bacarisse
Mr. Ed Wells

Art. 4590i. Medical Liability and Insurance Improvement Act

SUBCHAPTER A. GENERAL PROVISIONS

Short Title

Sec. 1.01. This part may be cited as the Medical Liability and Insurance Improvement Act of Texas.

Findings and Purposes

Sec. 1.02. (a) The Legislature of the State of Texas finds that:

(1) the number of health care liability claims (frequency) has increased since 1972 inordinately;

(2) the filing of legitimate health care liability claims in Texas is a contributing factor affecting medical professional liability rates;

(3) the amounts being paid out by insurers in judgments and settlements (severity) have likewise increased inordinately in the same short period of time;

(4) the effect of the above has caused a serious public problem in availability of and affordability of adequate medical professional liability insurance;

(5) the situation has created a medical malpractice insurance crisis in the State of Texas;

(6) this crisis has had a material adverse effect on the delivery of medical and health care in Texas, including significant reductions of availability of medical and health care services to the people of Texas and a likelihood of further reductions in the future;

(7) the crisis has had a substantial impact on the physicians and hospitals of Texas and the cost to physicians and hospitals for adequate medical malpractice insurance has dramatically risen in price, with cost impact on patients and the public;

(8) the direct cost of medical care to the patient and public of Texas has materially increased due to rising cost of malpractice insurance protection for physicians and hospitals in Texas;

(9) the crisis has increased the cost of medical care both directly through fees and indirectly through additional services provided for protection against future suits or claims; and defensive medicine has resulted in increasing cost to patients, private insurers, and the state and has contributed to the general inflation that has marked health care in recent years;

(10) satisfactory insurance coverage for adequate amounts of insurance in this area is often not available at any price;

(11) the combined effect of the defects in the medical, insurance, and legal systems has caused a serious public problem both with respect to the availability of coverage and to the high rates being charged by insurers for medical professional liability insurance to some physicians, health care providers, and hospitals;

(12) the adoption of certain modifications in the medical, insurance, and legal systems, the total effect of which is currently undetermined, may or may not have an effect on the rates charged by insurers for medical professional liability insurance;

(13) these facts have been verified by the Medical Professional Liability Study Commission, which was created by the 64th Legislature. For further amplification of these facts the legislature adopts the findings of the report of the commission.

(b) Because of the conditions stated in Subsection (a) of this section, it is the purpose of this Act to improve and modify the system by which health care liability claims are determined in order to:

(1) reduce excessive frequency and severity of health care liability claims through reasonable improvements and modifications in the Texas insurance, tort, and medical practice systems;

(2) decrease the cost of those claims and assure that awards are rationally related to actual damages;

(3) do so in a manner that will not unduly restrict a claimant's rights any more than necessary to deal with the crisis;

(4) make available to physicians, hospitals, and other health care providers protection against potential liability through the insurance mechanism at reasonably affordable rates;

(5) make affordable medical and health care more accessible and available to the citizens of Texas;

(6) make certain modifications in the medical, insurance, and legal systems in order to determine whether or not there will be an effect on rates charged by insurers for medical professional liability insurance; and

(7) make certain modifications to the liability laws as they relate to health care liability claims only and with an intention of the legislature to not extend or apply such modifications of liability laws to any other area of the Texas legal system or tort law.

Definitions

Sec. 1.03. (a) In this part:

(1) "Court" means any federal or state court.

(2) "Health care" means any act or treatment performed or furnished, or which should have been performed or furnished, by any health care provider for, to, or on behalf of a patient during the patient's medical care, treatment, or confinement.

(3) "Health care provider" means any person, partnership, professional association, corporation, facility, or institution duly licensed or chartered by the State of Texas to provide health care as a registered nurse, hospital, dentist, podiatrist, pharmacist, or nursing home, or an officer, employee, or agent thereof acting in the course and scope of his employment.

(4) "Health care liability claim" means a cause of action against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care or health care or safety which proximately results in injury to or death of the patient, whether the patient's claim or cause of action sounds in tort or contract.

(5) "Hospital" means a duly licensed public or private institution as defined in Chapter 241, Health and

Safety Code, or in Section 88, Chapter 243, Acts of the 55th Legislature, Regular Session, 1957 (Article 5547-88, Vernon's Texas Civil Statutes).

(6) "Medical care" means any act defined as practicing medicine in Article 4510, Revised Civil Statutes of Texas, 1925, as amended, performed or furnished, or which should have been performed, by one licensed to practice medicine in Texas for, to, or on behalf of a patient during the patient's care, treatment, or confinement.

(7) "Pharmacist" means one licensed under Chapter 107, Acts of the 41st Legislature, Regular Session, 1929, as amended (Article 4542a, Vernon's Texas Civil Statutes), who, for the purposes of this Act, performs those activities limited to the dispensing of prescription medicines which result in health care liability claims and does not include any other cause of action that may exist at common law against them, including but not limited to causes of action for the sale of mishandled or defective products.

(8) "Physician" means a person licensed to practice medicine in this state.

(9) "Representative" means the spouse, parent, guardian, trustee, authorized attorney, or other authorized legal agent of the patient or claimant.

(b) Any legal term or word of art used in this part, not otherwise defined in this part, shall have such meaning as is consistent with the common law.

SUBCHAPTER B. ADDITIONAL DISCIPLINARY POWERS [REPEALED]

Secs. 2.01 to 2.15. Repealed by Acts 1981, 67th Leg., 1st C.S., p. 36, ch. 1, § 6(a), eff. Aug. 5, 1981.

SUBCHAPTER C. DISTRICT REVIEW COMMITTEES [REPEALED]

Secs. 3.01 to 3.09. Repealed by Acts 1981, 67th Leg., 1st C.S., p. 36, ch. 1, § 6(a), eff. Aug. 5, 1981.

SUBCHAPTER D. NOTICE

Notice

Sec. 4.01. (a) Any person or his authorized agent asserting a health care liability claim shall give written notice of such claim by certified mail, return receipt requested, to each physician or health care provider against whom such claim is being made at least 60 days before the filing of a suit in any court of this state based upon a health care liability claim.

(b) In such pleadings as are subsequently filed in any court, each party shall state that it has fully complied with the provisions of this section and shall provide such evidence thereof as the judge of the court may require to determine if the provisions of this Act have been met.

(c) Notice given as provided in this Act shall toll the applicable statute of limitations to and including a period of 75 days following the giving of the notice, and this tolling shall apply to all parties and potential parties.

(d) All parties shall be entitled to obtain complete and unaltered copies of the claimant's medical records

from any other party within 10 days from the date of receipt of a written request for such records; provided, however, that the receipt of a medical authorization executed by the claimant herein shall be considered compliance by the claimant with this section.

(e) For the purposes of this section, and notwithstanding Section 5.08, Medical Practices Act (Article 4495b, Vernon's Texas Civil Statutes), or any other law, a request for the medical records of a deceased person or a person who is incompetent shall be deemed to be valid if accompanied by an authorization signed by a parent, spouse, or adult child of the deceased or incompetent person.

SUBCHAPTER E. AD DAMNUM CLAUSE

Pleadings not to State Damage Amount; Special Exception; Exclusion from Section

Sec. 5.01. Pleadings in a suit based on a health care liability claim shall not specify an amount of money claimed as damages. The defendant may file a special exception to the pleadings on the ground the suit is not within the court's jurisdiction, in which event, the plaintiff shall inform the court and defendant in writing of the total dollar amount claimed. This section does not prevent a party from mentioning the total dollar amount claimed in examining prospective jurors on voir dire or in argument to the court or jury.

SUBCHAPTER F. INFORMED CONSENT

Definition

Sec. 6.01. In this subchapter, "panel" means the Texas Medical Disclosure Panel.

Theory of Recovery

Sec. 6.02. In a suit against a physician or health care provider involving a health care liability claim that is based on the failure of the physician or health care provider to disclose or adequately to disclose the risks and hazards involved in the medical care or surgical procedure rendered by the physician or health care provider, the only theory on which recovery may be obtained is that of negligence in failing to disclose the risks or hazards that could have influenced a reasonable person in making a decision to give or withhold consent.

Texas Medical Disclosure Panel

Sec. 6.03. (a) The Texas Medical Disclosure Panel is created to determine which risks and hazards related to medical care and surgical procedures must be disclosed by health care providers or physicians to their patients or persons authorized to consent for their patients and to establish the general form and substance of such disclosure.

(b) The panel established herein is administratively attached to the Texas Department of Health. The Texas Department of Health, at the request of the panel, shall provide administrative assistance to the panel; and the Texas Department of Health and the panel shall coordinate administrative responsibilities in order to avoid

unnecessary duplication of facilities and services. The Texas Department of Health, at the request of the panel, shall submit the panel's budget request to the legislature. The panel shall be subject, except where inconsistent, to the rules and procedures of the Texas Department of Health; however, the duties and responsibilities of the panel as set forth in the Medical Liability and Insurance Improvement Act of Texas, as amended (Article 4590i, Vernon's Texas Civil Statutes), shall be exercised solely by the panel and the board or Texas Department of Health shall have no authority or responsibility with respect to same.

(c) The panel is composed of nine members, with three members licensed to practice law in this state and six members licensed to practice medicine in this state. Members of the panel shall be selected by the Commissioner of Health.

(d) The commissioner shall select members of the panel according to the following schedule:

(1) one attorney and two physicians to serve a term of two years, which term shall begin on September 1, 1979, and expire on August 31, 1981, or until a successor is qualified;

(2) one attorney and two physicians to serve a term of four years, which terms shall begin September 1, 1979, and expire August 31, 1983, or until a successor is qualified;

(3) one attorney and two physicians to serve a term of six years, which term shall begin September 1, 1979, and expire on August 31, 1985, or until a successor is qualified.

Thereafter, at the expiration of the term of each member of the panel so appointed, the commissioner shall select a successor, and such successor shall serve for a term of six years, or until his successor is selected. Any member who is absent for three consecutive meetings without the consent of a majority of the panel present at each such meeting may be removed by the commissioner at the request of the panel submitted in writing and signed by the chairman. Upon the death, resignation, or removal of any member, the commissioner shall fill the vacancy by selection for the unexpired portion of the term.

(e) Members of the panel are not entitled to compensation for their services, but each panelist is entitled to reimbursement of any necessary expense incurred in the performance of his duties on the panel including necessary travel expenses.

(f) Meetings of the panel shall be held at the call of the chairman or on petition of at least three members of the panel.

(g) At the first meeting of the panel each year after its members assume their positions, the panelists shall select one of the panel members to serve as chairman and one of the panel members to serve as vice-chairman, and each such officer shall serve for a term of one year. The chairman shall preside at meetings of the panel, and in his absence, the vice-chairman shall preside.

(h) Employees of the Texas Department of Health shall serve as the staff for the panel.

Duties of Panel

Sec. 6.04. (a) To the extent feasible, the panel shall identify and make a thorough examination of all medical treatments and surgical procedures in which physicians and health care providers may be involved in order to determine which of those treatments and procedures do and do not require disclosure of the risks and hazards to the patient or person authorized to consent for the patient.

(b) The panel shall prepare separate lists of those medical treatments and surgical procedures that do and do not require disclosure and for those treatments and procedures that do require disclosure shall establish the degree of disclosure required and the form in which the disclosure will be made.

(c) Lists prepared under Subsection (b) of this section together with written explanations of the degree and form of disclosure shall be published in the Texas Register.

(d) At least annually, or at such other period the panel may determine from time to time, the panel will identify and examine any new medical treatments and surgical procedures that have been developed since its last determinations, shall assign them to the proper list, and shall establish the degree of disclosure required and the form in which the disclosure will be made. The panel will also examine such treatments and procedures for the purpose of revising lists previously published. These determinations shall be published in the Texas Register.

Duty of Physician or Health Care Provider

Sec. 6.05. Before a patient or a person authorized to consent for a patient gives consent to any medical care or surgical procedure that appears on the panel's list requiring disclosure, the physician or health care provider shall disclose to the patient, or person authorized to consent for the patient, the risks and hazards involved in that kind of care or procedure. A physician or health care provider shall be considered to have complied with the requirements of this section if disclosure is made as provided in Section 6.06 of this subchapter.

Manner of Disclosure

Sec. 6.06. Consent to medical care that appears on the panel's list requiring disclosure shall be considered effective under this subchapter if it is given in writing, signed by the patient or a person authorized to give the consent and by a competent witness, and if the written consent specifically states the risks and hazards that are involved in the medical care or surgical procedure in the form and to the degree required by the panel under Section 6.04 of this subchapter.

Effect of Disclosure

Sec. 6.07. (a) In a suit against a physician or health care provider involving a health care liability claim that is based on the negligent failure of the physician or health care provider to disclose or adequately to disclose the risks and hazards involved in the medical care or surgical procedure rendered by the physician or health care provider:

(1) both disclosure made as provided in Section 6.05 of this subchapter and failure to disclose based on inclusion of any medical care or surgical procedure on the panel's list for which disclosure is not required shall be admissible in evidence and shall create a rebuttable presumption that the requirements of Sections 6.05 and 6.06 of this subchapter have been complied with and this presumption shall be included in the charge to the jury; and

(2) failure to disclose the risks and hazards involved in any medical care or surgical procedure required to be disclosed under Sections 6.05 and 6.06 of this subchapter shall be admissible in evidence and shall create a rebuttable presumption of a negligent failure to conform to the duty of disclosure set forth in Sections 6.05 and 6.06 of this subchapter, and this presumption shall be included in the charge to the jury; but failure to disclose may be found not to be negligent if there was an emergency or if for some other reason it was not medically feasible to make a disclosure of the kind that would otherwise have been negligence.

(b) If medical care or surgical procedure is rendered with respect to which the panel has made no determination either way regarding a duty of disclosure, the physician or health care provider is under the duty otherwise imposed by law.

Informed Consent for Hysterectomies

Sec. 6.08. (a) The panel shall develop and prepare written materials to inform a patient or person authorized to consent for a patient of the risks and hazards of a hysterectomy.

(b) The materials shall be available in English, Spanish, and any other language the panel considers appropriate. The information must be presented in a manner understandable to a layperson.

(c) The materials must include:

(1) a notice that a decision made at any time to refuse to undergo a hysterectomy will not result in the withdrawal or withholding of any benefits provided by programs or projects receiving federal funds or otherwise affect the patient's right to future care or treatment;

(2) the name of the person providing and explaining the materials;

(3) a statement that the patient or person authorized to consent for the patient understands that the hysterectomy is permanent and nonreversible and that the patient will not be able to become pregnant or bear children if she undergoes a hysterectomy;

(4) a statement that the patient has the right to seek a consultation from a second physician;

(5) a statement that the patient or person authorized to consent for the patient has been informed that a hysterectomy is a removal of the uterus through an incision in the lower abdomen or vagina and that additional surgery may be necessary to remove or repair other organs, including an ovary, tube, appendix, bladder, rectum, or vagina;

(6) a description of the risks and hazards involved in the performance of the procedure; and

(7) a written statement to be signed by the patient or person authorized to consent for the patient indicating

that the materials have been provided and explained to the patient or person authorized to consent for the patient and that the patient or person authorized to consent for the patient understands the nature and consequences of a hysterectomy.

(d) The physician or health care provider shall obtain informed consent under this section and Section 6.05 of this Act from the patient or person authorized to consent for the patient before performing a hysterectomy unless the hysterectomy is performed in a life-threatening situation in which the physician determines obtaining informed consent is not reasonably possible. If obtaining informed consent is not reasonably possible, the physician or health care provider shall include in the patient's medical records a written statement signed by the physician certifying the nature of the emergency.

(e) The panel may not prescribe materials under this section without first consulting with the Texas State Board of Medical Examiners.

SUBCHAPTER G. RES IPSA LOQUITUR

Application of Res Ipsa Loquitur

Sec. 7.01. The common-law doctrine of res ipsa loquitur shall only apply to health care liability claims against health care providers or physicians in those cases to which it has been applied by the appellate courts of this state as of the effective date of this subchapter.

Jury Instruction Authorized in Certain Cases

Sec. 7.02. (a) In a jury trial involving a health care liability claim against a physician or hospital for injury to

or death of a patient in which the court determines that the following instruction is reasonably applicable to the facts, the court shall provide the following instruction in the court's charge to the jury:

> "A finding of negligence may not be based solely on evidence of a bad result to the patient in question, but such a bad result may be considered by you, along with other evidence, in determining the issue of negligence; you shall be the sole judges of the weight, if any, to be given to any such evidence."

(b) Nothing in Subsection (a) of this section shall affect the existing law regarding the applicability or nonapplicability of the doctrine of res ipsa loquitur to a health care liability claim.

(c) The determination of whether the instruction authorized by Subsection (a) of this section is reasonably applicable to the facts shall be made by the trial court in its sole discretion, and such determination by the trial court shall be reviewable by an appellate court only for an abuse of such discretion.

SUBCHAPTER H. [BLANK]

SUBCHAPTER I. ADVANCE PAYMENTS

Secs. 9.01; 9.02. Repealed by Texas Rules of Evidence, eff. Sept. 1, 1983 (Acts 1939, 46th Leg., p. 201, § 1); Texas Rules of Criminal Evidence, eff. Sept. 1, 1986 [Acts 1985, 69th Leg., ch. 685, § 9(b)].

Adjustments for Advance Payments

Sec. 9.03. The advance payment shall inure to the exclusive benefit of the defendant or his or its carrier

making the advance payment, and in the event the advance payment exceeds the pro rata liability of the defendant or the carrier making the payment, the trial judge shall order any adjustment necessary to equalize the amount which each defendant is obligated to pay under this subchapter, exclusive of costs.

Certain Advance Payments Exempt from Repayment

Sec. 9.04. In no case shall an advance payment in excess of an award be repayable by the person receiving it.

SUBCHAPTER J. STATUTE OF LIMITATIONS

Limitation on Health Care Liability Claims

Sec. 10.01. Notwithstanding any other law, no health care liability claim may be commenced unless the action is filed within two years from the occurrence of the breach or tort or from the date the medical or health care treatment that is the subject of the claim or the hospitalization for which the claim is made is completed; provided that, minors under the age of 12 years shall have until their 14th birthday in which to file, or have filed on their behalf, the claim. Except as herein provided, this subchapter applies to all persons regardless of minority or other legal disability.

Causes of Action Covered by Other Law

Sec. 10.02. Causes of action accruing between the effective date of this Act and the effective date of Article 5.82, Insurance Code, shall be filed pursuant to Section 4 of Article 5.82.

SUBCHAPTER K. LIABILITY LIMITS

Definition

Sec. 11.01. In this subchapter, "consumer price index" means the index published by the Bureau of Labor Statistics of the United States Department of Labor that measures the average change in prices of goods and services purchased by urban wage earners and clerical workers' families and single workers living alone.

Limit on Civil Liability

Sec. 11.02. (a) In an action on a health care liability claim where final judgment is rendered against a physician or health care provider, the limit of civil liability for damages of the physician or health care provider shall be limited to an amount not to exceed $500,000.

(b) Subsection (a) of this section does not apply to the amount of damages awarded on a health care liability claim for the expenses of necessary medical, hospital, and custodial care received before judgment or required in the future for treatment of the injury.

(c) This section shall not limit the liability of any insurer where facts exist that would enable a party to invoke the common law theory of recovery commonly known in Texas as the "Stowers Doctrine."

(d) In any action on a health care liability claim that is tried by a jury in any court in this state, the following shall be included in the court's written instructions to the jurors: Do not consider, discuss, nor speculate whether or not liability, if any, on the part of any party is or is not subject to any limit under applicable law.

Alternative Partial Limit on Civil Liability

Sec. 11.03. In the event that Section 11.02(a) of this subchapter is stricken from this subchapter or is otherwise invalidated by a method other than through legislative means, the following shall become effective:

In an action on a health care liability claim where final judgment is rendered against a physician or health care provider, the limit of civil liability of the physician or health care provider for all past and future noneconomic losses recoverable by or on behalf of any injured person and/or the estate of such person, including without limitation as applicable past and future physical pain and suffering, mental anguish and suffering, consortium, disfigurement, and any other nonpecuniary damage, shall be limited to an amount not to exceed $150,000.

Adjustment of Liability Limits

Sec. 11.04. When there is an increase or decrease in the consumer price index with respect to the amount of that index on the effective date of this subchapter each of the liability limits prescribed in Section 11.02(a) or in Section 11.03 of this subchapter, as applicable, shall be increased or decreased, as applicable, by a sum equal to the amount of such limit multiplied by the percentage increase or decrease in the consumer price index between the effective date of this subchapter and the time at which damages subject to such limits are awarded by final judgment or settlement.

Subchapter's Application Prevails
over Certain Other Laws

Sec. 11.05. The provisions of this subchapter shall apply notwithstanding the provisions contained in Article 4671, Revised Civil Statutes of Texas, 1925, as amended, and the provisions of Article 5525, Revised Civil Statutes of Texas, 1925, as amended.

SUBCHAPTER L. MISCELLANEOUS PROVISIONS

Exception From Certain Laws

Sec. 12.01. (a) Notwithstanding any other law, no provisions of Sections 17.41-17.63, Business & Commerce Code, shall apply to physicians or health care providers as defined in Section 1.03(3) of this Act, with respect to claims for damages for personal injury or death resulting, or alleged to have resulted, from negligence on the part of any physician or health care provider.

(b) This section shall not apply to pharmacists.

SUBCHAPTER M. PROCEDURAL PROVISIONS

Cost Bond, Deposit, and Expert Report

Sec. 13.01. (a) In a health care liability claim, a claimant shall, not later than the 90th day after the date the claim is filed:

(1) file a separate cost bond in the amount of $5,000 for each physician or health care provider named by the claimant in the action;

(2) place cash in an escrow account in the amount of $5,000 for each physician or health care provider named in the action; or

(3) file an expert report for each physician or health care provider with respect to whom a cost bond has not been filed and cash in lieu of the bond has not been deposited under Subdivision (1) or (2) of this subsection.

(b) If, as to a defendant physician or health care provider, an expert report, cost bond, or cash in lieu of bond has not been filed or deposited within the period specified by Subsection (a) or (h) of this section, the court, on the motion of the affected physician or health care provider, shall enter an order that:

(1) requires the filing of a $7,500 cost bond with respect to the physician or health care provider not later than the 21st day after the date of the order; and

(2) provides that if the claimant fails to comply with the order, the action shall be dismissed for want of prosecution with respect to the physician or health care provider, subject to reinstatement in accordance with the applicable rules of civil procedure and Subsection (c) of this section.

(c) Before a claim that has been dismissed under Subsection (b)(2) of this section may be reinstated, the claimant must pay the costs of court incurred by the defendant before the dismissal and file a $7,500 cost bond for each defendant physician or health care provider.

(d) Not later than the later of the 180th day after the date on which a health care liability claim is filed or the last day of any extended period established under Subsection (f) or (h) of this section, the claimant shall, for each physician or health care provider against whom a claim is asserted:

(1) furnish to counsel for each physician or health care provider one or more expert reports, with a curriculum vitae of each expert listed in the report; or

(2) voluntarily nonsuit the action against the physician or health care provider.

(e) If a claimant has failed, for any defendant physician or health care provider, to comply with Subsection (d) of this section within the time required, the court shall, on the motion of the affected physician or health care provider, enter an order awarding as sanctions against the claimant or the claimant's attorney:

(1) the reasonable attorney's fees and costs of court incurred by that defendant;

(2) the forfeiture of any cost bond respecting the claimant's claim against that defendant to the extent necessary to pay the award; and

(3) the dismissal of the action of the claimant against that defendant with prejudice to the claim's refiling.

(f) The court may, for good cause shown after motion and hearing, extend any time period specified in Subsection (d) of this section for an additional 30 days. Only one extension may be granted under this subsection.

(g) Notwithstanding any other provision of this section, if a claimant has failed to comply with a deadline established by Subsection (d) of this section and after hearing the court finds that the failure of the claimant or the claimant's attorney was not intentional or the result of conscious indifference but was the result of an accident or mistake, the court shall grant a grace period of 30 days to

permit the claimant to comply with that subsection. A motion by a claimant for relief under this subsection shall be considered timely if it is filed before any hearing on a motion by a defendant under Subsection (e) of this section.

(h) The affected parties may agree to extend any time period specified in Subsection (a) or (d) of this section. An agreement under this subsection is binding and shall be honored by the court if signed by the affected parties or their counsel and filed with the court.

(i) Notwithstanding any other provision of this section, a claimant may satisfy any requirement of this section for filing an expert report by filing reports of separate experts regarding different physicians or health care providers or regarding different issues arising from the conduct of a physician or health care provider, such as issues of liability and causation. Nothing in this section shall be construed to mean that a single expert must address all liability and causation issues with respect to all physicians or health care providers or with respect to both liability and causation issues for a physician or health care provider.

(j) Nothing in this section shall be construed to require the filing of an expert report regarding any issue other than an issue relating to liability or causation.

(k) Notwithstanding any other law, an expert report filed under this section:

(1) is not admissible in evidence by a defendant;

(2) shall not be used in a deposition, trial, or other proceeding; and

(3) shall not be referred to by a defendant during the course of the action for any purpose.

(*l*) A court shall grant a motion challenging the adequacy of an expert report only if it appears to the court, after hearing, that the report does not represent a good faith effort to comply with the definition of an expert report in Subsection (r)(6) of this section.

(m) On the claimant's compliance with the requirements of Subsection (d) of this section:

(1) any cost bond filed or cash deposited in an escrow account by the claimant under this section shall be released;

(2) the claimant, the claimant's counsel, and any surety have no liability on the cost bond or cash deposit; and

(3) an execution shall not be issued on the cost bond or cash deposit.

(n) If a claimant nonsuits a health care liability claim against a physician or health care provider before filing a cost bond and seeks to refile the same or a similar health care liability claim against the physician or health care provider, the claimant shall file a $7,500 cost bond for each previously nonsuited physician or health care provider at the time of the filing of the health care liability claim. If the claimant fails to file the $7,500 cost bond for each physician or health care provider, on motion and hearing the court shall order the filing of the cost bond and the claimant shall pay the movant reasonable attorney's fees incurred in obtaining relief under this subsection.

(o) Notwithstanding any other provision of this section, a claimant who is proceeding without an attorney and who is unable to afford a cost bond or cash deposit may, in lieu of a cost bond or cash deposit, file an affidavit in the same form required for an affidavit in lieu of security for costs under the Texas Rules of Civil Procedure.

(p) In the event of a conflict between this section and another law, including a rule of procedure or court rule, this section controls to the extent of the conflict.

(q) Notwithstanding the provisions of Section 22.004, Government Code, the supreme court may not amend or adopt rules in conflict with this section. The district courts and statutory county courts in a county may not adopt local rules in conflict with this section.

(r) In this section:

(1) "Affected parties" means the claimant and the physician or health care provider who are directly affected by an act or agreement required or permitted by this section and does not include other parties to an action who are not directly affected by that particular act or agreement.

(2) "Claim" means a health care liability claim.

(3) "Claimant" means a party who files a pleading asserting a claim. All plaintiffs claiming to have sustained damages as the result of the bodily injury or death of a single person are considered to be a single claimant.

(4) "Defendant" means a physician or health care provider against whom a health care liability claim is asserted. The term includes a third-party defendant, cross-defendant, or counterdefendant.

(5) "Expert" means:

(A) with respect to a person giving opinion testimony regarding whether a physician departed from accepted standards of medical care, an expert qualified to testify under the requirements of Section 14.01(a) of this Act; or

(B) with respect to a person giving opinion testimony about a nonphysician health care provider, an expert who has knowledge of accepted standards of care for the diagnosis, care, or treatment of the illness, injury, or condition involved in the claim.

(6) "Expert report" means a written report by an expert that provides a fair summary of the expert's opinions as of the date of the report regarding applicable standards of care, the manner in which the care rendered by the physician or health care provider failed to meet the standards, and the causal relationship between that failure and the injury, harm, or damages claimed.

Discovery Procedures

Sec. 13.02. (a) In every health care liability claim the plaintiff shall within 45 days after the date of filing of the original petition serve on the defendant's attorney or, if no attorney has appeared for the defendant, on the defendant full and complete answers to the appropriate standard set of interrogatories and full and complete responses to the appropriate standard set of requests for production of documents and things promulgated in accordance with Subsection (c) of this section.

(b) Every physician or health care provider who is a defendant in a health care liability claim shall within 45 days after the date on which an answer to the petition was

due serve on the plaintiff's attorney or, if the plaintiff is not represented by an attorney, on the plaintiff full and complete answers to the appropriate standard set of interrogatories and complete responses to the standard set of requests for production of documents and things promulgated pursuant to Subsection (c) of this section.

(c) The chief justice of the Supreme Court of Texas shall within 30 days after the effective date of this Act appoint as members of the Health Care Liability Discovery Panel three persons from a list of attorneys to be submitted by a statewide association of attorneys whose members include persons who customarily represent patients in health care liability actions and three persons from a list of attorneys to be submitted by a statewide association of attorneys whose members include persons who customarily represent defendants in health care liability actions. Members of the Health Care Liability Discovery Panel serve without compensation. On or before the 1st day of November, 1993, the Health Care Liability Discovery Panel shall promulgate standard sets of interrogatories and requests for production of documents and things appropriate for each of the categories of plaintiffs and defendants usually involved in health care liability claims. In preparing standard sets of interrogatories the Health Care Liability Discovery Panel shall not be restricted in number by any limit imposed under the Texas Rules of Civil Procedure.

(d) The Supreme Court of Texas shall review the standard sets of interrogatories and requests for production of documents and things promulgated by the Health Care Liability Discovery Panel and shall, no later than January 1, 1994, approve them in their entirety, disapprove them in their entirety, or approve them with modifications.

If the supreme court disapproves such standard sets of interrogatories and requests for production of documents and things in their entirety, then such standard sets shall be null and void and of no effect, and the Health Care Liability Discovery Panel shall be disbanded. If the supreme court approves such standard sets of interrogatories and requests for production of documents and things with modifications, then the Health Care Liability Discovery Panel shall either approve or disapprove of such standard sets of interrogatories and requests for production of documents and things as modified by the supreme court by a vote of at least five of the six members of the panel. If the modifications made by the supreme court fail to obtain the necessary vote for approval by the panel, then such standard sets of interrogatories and requests for production of documents and things shall be null and void and of no effect and the panel shall be disbanded. If the panel approves the modified standard sets of interrogatories and requests for production of documents and things, then the supreme court shall proceed to publish the standard sets in accordance with Subsection (e) of this section.

(e) As soon as practical after the approval of such standard sets of interrogatories and requests for production of documents and things by the Health Care Liability Discovery Panel and the Supreme Court of Texas, and in any event no later than February 1, 1994, the supreme court shall publish such standard sets. Notwithstanding any other law, the supreme court shall not be required to publish such standard sets of interrogatories and requests for production of documents and things for public comment. Beginning on April 1, 1994, all plaintiffs and all physicians or health care providers who are defendants in a health care liability claim in which the plaintiff's original

petition is filed on or after that date shall file full and complete answers and responses in accordance with Subsections (a) and (b) of this section.

(f) Nothing in this section shall limit or impede the Supreme Court of Texas in exercising its rulemaking authority pursuant to Sections 22.003 and 22.004, Government Code.

(g) Except on motion and for good cause shown, no objection may be asserted regarding any standard interrogatory or request for production of documents and things, but no response shall be required where a particular interrogatory or request is clearly inapplicable under the circumstances of the case.

(h) Failure to file full and complete answers and responses to standard interrogatories and requests for production of documents and things in accordance with Subsections (a) and (b) of this section or the making of a groundless objection under Subsection (g) of this section shall be grounds for sanctions by the court in accordance with the Texas Rules of Civil Procedure on motion of any party.

(i) The time limits imposed under Subsections (a) and (b) of this section may be extended by the court on the motion of a responding party for good cause shown and shall be extended if agreed in writing between the responding party and all opposing parties. In no event shall an extension be for a period of more than an additional 30 days.

(j) If a party is added by an amended pleading, intervention, or otherwise, the new party shall file full and complete answers to the appropriate standard set of

interrogatories and full and complete responses to the standard set of requests for production of documents and things no later than 45 days after the date of filing of the pleading by which the party first appeared in the action.

(k) If information or documents required to provide full and complete answers and responses as required by this section are not in the possession of the responding party or attorney when the answers or responses are filed, the party shall supplement the answers and responses in accordance with the Texas Rules of Civil Procedure.

(*l*) Nothing in this section shall preclude any party from taking additional non-duplicative discovery of any other party. The standard sets of interrogatories provided for in this section shall not constitute, as to each plaintiff and each physician or health care provider who is a defendant, the first of the two sets of interrogatories permitted under the Texas Rules of Civil Procedure.

(m) Notwithstanding any other provisions of this section, if a court of this state has, prior to the effective date of this section, signed an order in tort litigation in which cases have been consolidated for discovery providing for standard sets of interrogatories and requests for production of documents and things, compliance with such an order shall be deemed to be compliance with the requirements of this section.

SUBCHAPTER N. EXPERT WITNESSES

Qualification of Expert Witness in Suit Against Physician

Sec. 14.01. (a) In a suit involving a health care liability claim against a physician for injury to or death of a patient, a person may qualify as an expert witness on

the issue of whether the physician departed from accepted standards of medical care only if the person is a physician who:

(1) is practicing medicine at the time such testimony is given or was practicing medicine at the time the claim arose;

(2) has knowledge of accepted standards of medical care for the diagnosis, care, or treatment of the illness, injury, or condition involved in the claim; and

(3) is qualified on the basis of training or experience to offer an expert opinion regarding those accepted standards of medical care.

(b) For the purpose of this section, "practicing medicine" or "medical practice" includes, but is not limited to, training residents or students at an accredited school of medicine or osteopathy or serving as a consulting physician to other physicians who provide direct patient care, upon the request of such other physicians.

(c) In determining whether a witness is qualified on the basis of training or experience, the court shall consider whether, at the time the claim arose or at the time the testimony is given, the witness:

(1) is board certified or has other substantial training or experience in an area of medical practice relevant to the claim; and

(2) is actively practicing medicine in rendering medical care services relevant to the claim.

(d) The court shall apply the criteria specified in Subsections (a), (b), and (c) of this section in determining

whether an expert is qualified to offer expert testimony on the issue of whether the physician departed from accepted standards of medical care, but may depart from those criteria if, under the circumstances, the court determines that there is a good reason to admit the expert's testimony. The court shall state on the record the reason for admitting the testimony if the court departs from the criteria.

(e) A pretrial objection to the qualifications of a witness under this section must be made not later than the later of the 21st day after the date the objecting party receives a copy of the witness's curriculum vitae or the date of the witness's deposition. If circumstances arise after the date on which the objection must be made that could not have been reasonably anticipated by a party before that date and that the party believes in good faith provide a basis for an objection to a witness's qualifications, and if an objection was not made previously, this subsection does not prevent the party from making an objection as soon as practicable under the circumstances. The court shall conduct a hearing to determine whether the witness is qualified as soon as practicable after the filing of an objection and, if possible, before trial. If the objecting party is unable to object in time for the hearing to be conducted before the trial, the hearing shall be conducted outside the presence of the jury. This subsection does not prevent a party from examining or cross-examining a witness at trial about the witness's qualifications.

(f) This section does not prevent a physician who is a defendant from qualifying as an expert.

(g) In this section, "physician" means a person who is:

(1) licensed to practice medicine in the United States; or

(2) a graduate of a medical school accredited by the Liaison Committee on Medical Education or the American Osteopathic Association.

SUBCHAPTER O. ARBITRATION AGREEMENTS

Arbitration Agreements

Sec. 15.01. (a) No physician, professional association of physicians, or other health care provider shall request or require a patient or prospective patient to execute an agreement to arbitrate a health care liability claim unless the form of agreement delivered to the patient contains a written notice in 10-point boldface type clearly and conspicuously stating:

> UNDER TEXAS LAW, THIS AGREEMENT IS INVALID AND OF NO LEGAL EFFECT UNLESS IT IS ALSO SIGNED BY AN ATTORNEY OF YOUR OWN CHOOSING. THIS AGREEMENT CONTAINS A WAIVER OF IMPORTANT LEGAL RIGHTS, INCLUDING YOUR RIGHT TO A JURY. YOU SHOULD NOT SIGN THIS AGREEMENT WITHOUT FIRST CONSULTING WITH AN ATTORNEY.

(b) A violation of this section by a physician or professional association of physicians constitutes a violation of the Medical Practice Act (Article 4495b, Vernon's Texas Civil Statutes), and shall be subject to the enforcement provisions and sanctions contained in Subchapter D of that Act.

(c) A violation of this section by a health care provider other than a physician shall constitute a false,

misleading, or deceptive act or practice in the conduct of trade or commerce within the meaning of Section 17.46 of the Deceptive Trade Practices-Consumer Protection Act (Subchapter E, Chapter 17, Business & Commerce Code), and shall be subject to an enforcement action by the consumer protection division pursuant to said Act and subject to the penalties and remedies contained in Section 17.47 of that Act, notwithstanding Section 12.01 of this Act or any other law.

(d) Notwithstanding any other provision of this section, a person who is found to be in violation of this section for the first time shall be subject only to injunctive relief or other appropriate order requiring the person to cease and desist from such violation, and not to any other penalty or sanction.

SUBCHAPTER P. PREJUDGMENT INTEREST

Application of Other Law

Sec. 16.01. Notwithstanding Articles 1E.101, 1E.102, and 1E.104-1E.108, Title 79, Revised Statutes, prejudgment interest in a health care liability claim shall be awarded in accordance with this subchapter.

Computation of Prejudgment Interest

Sec. 16.02. (a) In a health care liability claim, prejudgment interest may not be charged with respect to a defendant physician or health care provider who has settled the claim before the 181st day after the date notice of the claim was first mailed to the physician or health care provider.

(b) In a health care liability claim that is not settled within the period specified by Subsection (a) of this section, the judgment must include prejudgment interest on past damages found by the trier of fact, but shall not include prejudgment interest on future damages found by the trier of fact.

(c) Prejudgment interest allowed under this subchapter shall be computed in accordance with Article 1E.103, Title 79, Revised Statutes, for a period beginning on the date of injury and ending on the date before the date the judgment is signed.

(d) In this section:

(1) "Past damages" means damages awarded to compensate the claimant for loss the claimant will incur for a period beginning on the date of injury and ending on the date before the date of judgment.

(2) "Future damages" means damages awarded to compensate the claimant for loss the claimant will incur after the date of judgment.

U.S. Const. amend. XIV

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. – Amendment XIV, *United States Constitution*.

Opinion on Kimberly D. Nonmacher v. Marcella B. Ritter, M.D. and Bryon B. Holt, M.D.

Kimberly Nonmacher has a very rare disorder called Klippel-Trenaunay-Weber Syndrome (KTS) which is a disorder of the vascular system. This disorder puts her at increased risk for the development of blood clots, particularly venous thrombosis. Estrogens even given at low doses can increase a woman's risk for the development of blood clots in the venous system. Therefore, the use of estrogen may have contributed to the development of blood clots in Kimberly Nonmacher. A standard text in OB-Gyn, Clinical Gynecologic Endocrinology and Infertility edited by Lcon Speroff, M.D. states "If a patient has a congenital predisposition for venous thrombosis or if she is considered to be at high risk for venous thromboembolism, the clinician and patient can consider the combination of hormone therapy and chronic anticoagulation, in consultation with a hematologist (p. 750, 6th edition)" There are other options for protection against bone loss that would not place a patient at increased risk for the development of blood clots as estrogen does. In my opinion, consultation with a hematologist or vascular disease expert would have been prudent before giving this patient estrogen. On the other hand, patients with KTS are at risk for developing blood clots even in the absence of estrogen therapy so it is hard to say the exact cause of the blood clot that developed.

Brad Van Voorhis, M.D.
Professor, University of Iowa Department of Ob-Gyn

THE UNIVERSITY OF TEXAS
SOUTHWESTERN MEDICAL CENTER
AT DALLAS

Bruce R. Carr, M.D.
Professor and Director,
Division of Reproductive
Endocrinology
Holder, Paul C. MacDonald
Distinguished Chair in
Obstetrics and Gynecology

Department of Obstetrics
and Gynecology

November 12, 2001

Brantly Harris, Lawyer
808 Travis Street, Suite 916
Houston, TX 77002

Re: *Kimberly D. Nonmacher* v. *Marcella B. Ritter, M.D. and Byron B. Holt, M.D.*, Cause No. 2000-63686, In the District Court of Harris County, Texas 215th Judicial District

Dear Mr. Harris:

At your request I have reviewed the records and deposition sent to me by your office related to the above referenced case.

The question regarding Dr. Ritter's evaluation and follow-up of Ms. Nonmacher as appropriate is discussed as follows:

> It is my opinion that any woman being treated with Depo Luron and leiomyomata (fibroids) in an attempt to reduce the size of fibroids prior to surgery should be appropriately evaluated at regular intervals. This is usually every 2-3 months. If a patient reports increasing pain she

should be seen earlier and re-evaluated. The reason is that occasionally this could mean necrosis of the fibroid, which might indicate that the medicine should be discontinued, or the surgery performed at the earliest convenience of the physician and the patient. In this case, this was not apparently done. Furthermore, the correct dose of Depo Lupron is 3.75 mg IM every 4 weeks (once a month) and she only received two doses 10/14/98 and 1/7/99. This is not the correct way to prescribe Depo Lupron at the 3.75 mg dose. A larger dose would be required if given at 3 month intervals. Thus the drug was probably not having much effect and would explain why she still had menstrual periods. However, the outcome, i.e. surgical removal of the fibroid was performed as planned, but in an emergency situation which placed the patient at increased risk. Thus in summary, the patient was not carefully followed which would be considered customary, but even more so with her history of K-T-S. Further she received the wrong dose or wrong frequency of Depo Lupron. If I can be of further help in the matter feel free to contact me.

Sincerely,

/s/ Bruce R. Carr
Bruce R. Carr, M.D.
Professor and Director, Division of Reproductive Endocrinology and Infertility Holder, Paul C. MacDonald Distinguished Chair in Obstetrics and Gynecology

BRC/dbf

HEARING CONDUCTED BY THE
TEXAS STATE OFFICE OF
ADMINISTRATIVE HEARINGS
SOAH DOCKET NO. 503-03-
LICENSE NO. F-7101

IN THE MATTER OF THE	BEFORE THE
COMPLAINT AGAINST:	TEXAS STATE BOARD OF
MARCELLA B. RITTER, M.D.	MEDICAL EXAMINERS

COMPLAINT

TO THE HONORABLE TEXAS STATE BOARD OF MEDICAL EXAMINERS AND THE HONORABLE ADMINISTRATIVE LAW JUDGE TO BE ASSIGNED:

COMES NOW, the Staff of the Texas State Board of Medical Examiners ("the Board"), and files this Complaint against Marcella B. Ritter, M.D., ("Respondent"), based on Respondent's alleged violations of the Medical Practice Act ("the Act"), TEX. OCC. CODE ANN., Title 3, Subtitle B, Chapters 151-165 (Vernon's 2002), and would show the following:

I. Introduction

The filing of this Complaint and the relief requested are necessary to protect the health and public interest of the citizens of the State of Texas, as provided in Section 151.003 of the Act.

II. Legal Authority and Jurisdiction

Respondent is a Texas Physician and holds Texas Medical License Number F-7101, issued by the Board in

1980, which was in full force and effect at all times material and relevant to this Complaint. All jurisdictional requirements have been satisfied.

III. Procedural Background

1. The Board received information that Respondent may have violated the Act and, based on that information, conducted an investigation. The investigation compiled evidence that support allegations of a violation.

2. Respondent was invited to attend an informal Show Compliance Proceeding and Settlement Conference ("ISC"), which was conducted in accordance with §2001.054(c), Gov't Code and §164.004 of the Act. The Board representatives ("Panel"), including at least one physician, reviewed and considered evidence from the investigation, as well as any information presented by Respondent. The Panel determined that Respondent had violated the Act.

3. In an attempt to resolve this matter informally, the Panel offered Respondent a proposed Agreed Order, setting forth certain terms and conditions. Respondent failed and/or refused to agree to the proposed settlement offer and no agreement to settle this matter has been reached by the parties.

IV. Factual Allegations

Board Staff has received information and on that information believes that Respondent has violated the Act. Based on such information and belief, Board Staff alleges:

1. Patient K.N. suffers from hemihypertrophy hemangioma (one side of her body [left] is larger than the other side [right]). Patient K.N.'s primary care physician performed a sonogram on October 5, 1998, which indicated a pelvic mass.

2. Patient K.N. was referred presented to Respondent on October 8, 1998 for evaluation. Respondent's examination revealed an enlarged uterus. Respondent ordered an MRI, which revealed a 16 cm solid mass seen in the uterus and a possible right ovary mass. Respondent started Patient K.N. on Depo Lupron injections in an attempt to reduce the size of the uterine mass.

3. In December 1998, Patient K.N. called Respondent's office with a complaint of increased bleeding and pain.

4. Patient K.N. went the emergency room at St. Luke's Hospital on January 6, 1999 for a complaint of severe abdominal pain, paralysis, nausea, vomiting, and difficulty breathing. An associate of Respondent's assessed her. Patient K.N. received a second Lupron injection and was released.

5. After the emergency room visit on January 6, 1999, Patient K.N. tried to reach Respondent or schedule an appointment with Respondent several times between January 07, 1999 and March 17, 1999. On January 15, 1999, patient K.N. was instructed to obtain an ultrasound to establish the size of the uterus. Respondent scheduled Patient K.N. for a hysterectomy in April 1999.

6. Patient K.N. presented to Memorial Hermann Hospital on March 21, 1999 with a complaint of abdominal pain and vomiting for two hours. The emergency room

physician documented that he contacted the on-call physician for Respondent. Patient K.N. was to follow-up with the Respondent the following morning.

7. On March 23, 1999, Patient K.N. returned to the emergency room via ambulance. She was taken to surgery for an exploratory laparotomy. Approximately seven hundred (700) ccs of blood was found in the abdomen secondary to an ulcerating and degenerating large leiomyomata. A hysterectomy and bilateral salpingo-oopherectomy was performed.

8. There were approximately twenty-five telephone message notes in the record of Patient K.N. from October 1998 through March 1999. The record indicated that Respondent or her staff responded to each call from Patient K.N.

9. Throughout the course of treating this patient Respondent did not timely and properly respond to the patient's telephone calls and complaints regarding increasing pain and bleeding. Respondent failed to prescribe appropriate Depo Lupron therapy. Respondent did not provide appropriate follow-up care after administering Depo Lupron. Respondent did not timely see the patient despite continued medical problems. Respondent failed to assess the patient after repeated complaints and emergency room visits.

The actions of Respondent constitute, but are not limited to, the following violations of the Act; Section 164.051(a)(6) which authorizes the Board to take disciplinary action against a licensed Texas physician who fails to practice medicine in an acceptable professional manner consistent with public health and welfare; Section 164.052(a)(5) of the Act which authorizes the Board to

discipline a licensed Texas physician who commits unprofessional or dishonorable conduct that is likely to deceive or defraud the public, as provided by Section 164.053, or injure the public; Section 164.053(a)(5) of the Act by prescribing or administering a drug or treatment that is nontherapeutic in nature or nontherapeutic in the manner the drug or treatment is administered or prescribed; and Section 164.051(a)(3) of the Act by committing or attempting to commit a violation of a rule adopted under the Act.

V. Applicable Statutes, Rules, and Agency Policy

Respondent's conduct, as described above, constitutes grounds for the Board to revoke or suspend Respondent's Texas, medical license or to impose any other authorized means of discipline upon the Respondent. The following Statutes, Rules, and Agency Policy are applicable to this matter:

A. PROCEDURES FOR THE CONDUCT OF THIS HEARING:

1. Section 165.007(a) of the Act requires that the Board adopt procedures governing formal disposition of a contested case before the State Office of Administrative Hearings.

2. 22 TEX. ADMIN. CODE, Chapter 187 provides the procedures adopted by the Board under the requirement of Section 165.007(a) of the Act.

3. 1 TEX. ADMIN. CODE §155.3(c) provides that the procedural rules of the state agency on behalf of which the hearing is conducted govern procedural matters that relate to the hearing as

required by law, to wit: Section 165.007(a) of the Act, as cited above.

4. 1 TEX. ADMIN. CODE, CHAPTER 155 provides the rules of procedure adopted by SOAH for contested case proceedings.

B. VIOLATIONS WARRANTING DISCIPLINARY ACTION:

1. Section 164.051(a)(6) of the Act authorizes the Board to take disciplinary action against a licensed Texas physician who fails to practice medicine in an acceptable professional manner consistent with public health and welfare. 22 Tex. Admin. Code, Section 190.1(c)(1) provides guidelines of acts, practices and omissions that are presumed to be violations of Section 164.051(a)(6) of the Act.

2. Section 164.052(a)(5) of the Act defines a prohibited act to include the commission of unprofessional or dishonorable conduct that is likely to deceive or defraud the public, as provided by Section 164.053, or injure the public.

3. Section 164.053(a)(5) of the Act defines unprofessional and dishonorable conduct to include prescribing or administering a drug or treatment that is non-therapeutic in nature or non-therapeutic in the manner the drug or treatment is administered or prescribed.

C. SANCTIONS THAT MAY BE IMPOSED:

1. Section 164.001 of the Act authorizes the Board to impose a range of disciplinary actions against a person for violation of the Act or a Board rule. Such sanctions include: revocation, suspension,

probation, public reprimand, limitation or restriction on practice, counseling or treatment, required educational or counseling programs, monitored practice, public service, and an administrative penalty.

2. Section 165.003 of the Act sets forth statutory requirements for the amount and basis of an administrative penalty. 22 TEX. ADMIN. CODE § 187.40 and 22 TEX. ADMIN. CODE §190.1(f) set forth the Board's requirements for assessing an administrative penalty.

3. 22 TEX. ADMIN. CODE § 187.39 authorizes the Board to assess, in addition to penalty imposed, costs of the investigation and administrative hearing in the case of a default judgment or upon adjudication that Respondent is in violation of the Act after a trial on the merits.

4. 22 TEX. ADMIN. CODE Chapter 190 provides disciplinary guidelines intended to provide guidance and a framework of analysis for administrative law judges in the making of recommendations in contested licensure and disciplinary matters and to provide guidance as to the types of conduct that constitute violations of the Act or board rules.

V. NOTICE TO RESPONDENT

IF YOU DO NOT FILE A WRITTEN ANSWER TO THIS NOTICE WITH THE STATE OFFICE OF ADMINISTRATIVE HEARINGS WITHING 20 DAYS OF THE DATE NOTICE OF SERVICE WAS MAILED, A DEFAULT JUDGMENT MAY BE ENTERED AGAINST YOU, WHICH MAY INCLUDE THE DENIAL OF LICENSURE OR ANY OR ALL OF THE REQUESTED SANCTIONS

INCLUDING THE REVOCATION OF YOUR LICENSE. IF YOU FILE A WRITTEN ANSWER, BUT THEN FAIL TO ATTEND THE HEARING, A DEFAULT JUDGMENT MAY BE ENTERED AGAINST YOU, WHICH MAY INCLUDE THE DENIAL OF LICENSURE OR ANY OR ALL OF THE REQUESTED SANCTIONS INCLUDING THE REVOCATION OF YOUR LICENSE. A COPY OF ANY RESPONSE YOU FILE WITH THE STATE OFFICE OF ADMINISTRATIVE HEARINGS SHALL ALSO BE PROVIDED TO THE HEARINGS COORDINATOR OF THE TEXAS STATE BOARD OF MEDICAL EXAMINERS.

PURSUANT TO 22 TEX. ADMIN. CODE § 187.27(2), A WRITTEN ANSWER SHALL SPECIFICALLY ADMIT OR DENY EACH FACTUAL ALLEGATION MADE AGAINST THE RESPONDENT.

WHEREFORE, PREMISES CONSIDERED, Board Staff requests that an administrative law judge employed by the State Office of Administrative Hearings conduct a contested case hearing on the merits of the Complaint, in accordance with Section 164.007(a) of the Act. Upon final hearing, Board Staff requests that the Honorable Administrative Law Judge issue a Proposal for Decision ("PFD") that reflects Respondent's violation of the Act as set forth in this Complaint. Following issuance of the PFD, Board Staff requests that the Board enter an Order to revoke or suspend Respondent's medical license or that other means of discipline be imposed.

In the event that the Board determines to stay any revocation or suspension and grant probation in this case or to impose restrictions on Respondent's license, Board

Staff requests that the following restrictions be considered:

1. Probation should continue for an appropriate period of time.

2. Respondent should be restricted from practicing medicine in Texas until Respondent requests permission in writing to resume the practice of medicine in Texas, personally appears before the Board to orally petition for permission to resume such practice, and provides sufficient evidence and information that, in the discretion of the Board, adequately indicates that Respondent is physically, mentally, and otherwise competent to safely practice medicine, or such other restrictions as may be found to be appropriate.

3. Respondent should be required to complete additional hours of Continuing Medical Education each year during the probationary period.

4. Respondent should be required to maintain patient medical and billing records in accordance with 22 TEX. ADMIN. CODE, Chapter 165.

5. Respondent's patient medical and billing records should be monitored by a physician designated by the Executive Director of the Board.

6. Respondent should be required to perform public service.

Board Staff further requests that the Board impose an administrative penalty against Respondent in an appropriate amount for each violation and for each day the violation continues, based on the seriousness of the violations, the economic harm to property or the environment

caused by the violation, the history of previous violations, the amount necessary to deter a future violation, efforts to correct the violation, the estimated cost of the investigation and prosecution of the case, and the estimated cost of any future monitoring of the licensee.

Board Staff further requests that the Board assess, in addition to the administrative penalty imposed, the costs of the Administrative hearing.

Board Staff further requests that Respondent be reprimanded for Respondent's violations of the Act.

Respectfully submitted,

TEXAS STATE BOARD OF MEDICAL EXAMINERS

By: /s/ Scott M. Freshour
Scott M. Freshour, Staff Attorney
Texas State Bar No 00789299
Telephone: (512) 305-7096
FAX: (512) 305-7007
333 Guadalupe, Tower 3,
Suite 610
Austin, Texas 78701

THE STATE OF TEXAS §
§
COUNTY OF TRAVIS §

SUBSCRIBED AND SWORN to before me by the said Scott M. Freshour on 8 day of August, 2003.

(SEAL) BONNIE KADERKA
NOTARY PUBLIC
STATE OF TEXAS
My Comm. Exp. 6-18-2004

/s/ Bonnie Kaderka
Notary Public,
State of Texas

Filed with the Texas State Board of Medical Examiners on 8 day of August, 2003.

/s/ Donald W. Patrick
Donald W. Patrick, M.D., J.D.
Executive Director
Texas State Board of Medical Examiners

CERTIFICATE OF SERVICE

I certify that on 8 day of August, 2003 a true and correct copy of the foregoing Complaint has been served in compliance with Section 155.25 of the State Office of Administrative Hearings Rules of Procedures on the following individuals at the locations and in the manner indicated below:

BY CERTIFIED MAIL RETURN RECEIPT REQUESTED
Marion Woodrow Kruse, Jr.
Kruse Law Firm, P.C.
1330 Post Oak Blvd., Ste. 1500
Houston, Tx. 77056

BY FIRST CLASS MAIL
Marcella B. Ritter, M.D.
6550 Fannin, Ste. 2221
Houston, Tx. 77030

BY HAND DELIVERY
Docket Clerk
State Office of Administrative Hearings
William P. Clements Bldg.
300 W. 15th Street, Suite 504
Austin, Texas 78701-1649

BY HAND DELIVERY
Hearings Coordinator
Texas State Board of Medical Examiners
333 Guadalupe, Tower 3, Suite 610
Austin, Texas 78701

/s/ Scott M. Freshour
Scott M. Freshour
Staff Attorney

IN THE SUPREME COURT OF TEXAS

NO. 03-0698	§	
KIMBERLY D. NONMACHER	§	**Harris County,**
v.	§	**14th District.**
MARCELLA B. RITTER, M.D., AND BYRON B. HOLT, M.D.	§	(Filed Dec. 17, 2003)

October 10, 2003

Petitioner's petition for review, filed herein in the above numbered and styled case, having been duly considered, is ordered, and hereby is, denied.

December 5, 2003

Petitioner's motion for rehearing of petition for review, filed herein in the above numbered and styled case, having been duly considered, is ordered, and hereby is, denied.

* * *

I, ANDREW WEBER, Clerk of the Supreme Court of Texas, do hereby certify that the above and attached is a true and correct copy of the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appear of record in the minutes of said Court under the date shown.

It is further ordered that petitioner, KIMBERLY D. NONMACHER, pay all costs incurred on this petition.

WITNESS my hand and seal of the Supreme Court of Texas, at the City of Austin, this the 15th day of December, 2003.

/s/ Andrew Weber
Andrew Weber, Clerk

By Gena Pelham, Deputy Clerk

Opinion on Kimberly D. Nonmacher v Marcella B. Ritter, M.D. and Byron B. Holt, M.D.

Kimberly Nonmacher has a very rare disorder called Klippel [Illegible]-Weber Syndrome (KTS) which is a disorder of the vascular system. This disorder puts her at increased risk for the development of blood clots, particularly venous thrombosis. Estrogens even given at low doses can increase a woman's risk for the development of blood clots in the venous system. Therefore, the use of estrogen probably contributed to the development of blood clots in Kimberly Nonmacher. A standard text in OB-Gyn, Clinical Gynecologic Endocrinology and Infertility edited by Leon Speroff, M.D. states "If a patient has a congenital predisposition for venous thrombosis or if she is considered to be at high risk for venous thromboembolism, the clinician and patient can consider the combination of hormone therapy and chronic anticoagulation, in consultation with a hematologist (p.750, 6th edition)" There are other opinions for protection against bone loss that would not place a patient at increased risk for the development of blood clots as estrogen does. In my opinion, consultation with a hematologist or vascular disease expert would have been prudent before giving this patient estrogen. The other options that could have been considered would include the use of calcium, exercise and bisphosphonates to prevent bone loss. Patients with KTS are at risk for developing blood clots even in the absence of estrogen therapy so it is impossible to say that estrogen therapy

definitely caused her blood clots. However, I believe that estrogen use contributed to this problem in Kimberly.

Brad Van Voorhis, M.D.
Professor, University of Iowa Department of Ob-Gyn

/s/ Brad Van Voorhis

VASCULAR BIRTHMARKS

Hemangiomas and Malformations

John B. Mulliken
M.D., F.A.C.S.

Associate Professor of Surgery
Harvard Medical School

Children's Hospital and
Brigham and Women's Hospital
Boston, Massachusetts

Anthony E. Young
M.A., M. Chir., F.R.C.S.

Consultant Surgeon
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1988

* * *

Prophylaxis

In view of these findings, we strongly suggest that no patient with extensive venous or combined malformations receive estrogen for contraceptive or other purposes. Because of the venous congestion and the increased skin blood flow, the use of prophylactic anticoagulation will make an operation more difficult; however, on balance, we would recommend that all patients should also be offered antithrombotic prophylaxis prior to any form of surgical intervention.

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